TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~ 1903. 1904.

No. ~~685~~ 269. 24.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE AMERICAN TRADING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED APRIL 14, 1903.

(18,893.)

(18,893.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 665.

THE NORTHERN PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE AMERICAN TRADING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant-Appellee,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY ET AL., Defendants-Appellees, The American Trading Company, Intervenor-Appellant.

Transcript of Record.

Appeal from the circuit court of the United States for the southern district of New York.

Printed under the direction of the clerk.
[Stamped:] United States circuit court of appeals, second circuit. Filed Mar. 4, 1902. William Parkin, clerk.

1 Circuit Court of the United States for the Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
against
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

Please take notice that upon the annexed petition and all the pleadings and proceedings in the above entitled cause, application will be made to the circuit court of the United States for the southern district of New York, at the rooms of the said court at the post office building in the city of New York, on the 16th day of April, 1897, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to file the annexed petition of the American Trading Company, and for the enforcement of its claim therein set forth against the property purchased by the Northern Pacific Railway Company under the decree in the above entitled cause, and similar decrees entered in other jurisdictions in accordance with the provisions of said decree, and with the usual practice of said court in relation to claims of similar character, and for such other or further order or relief as to the court may seem equitable and proper.

Dated New York, March 26th, 1897.

Yours, &c., HOWARD VAN SINDEREN,
Solicitor for American Trading Company, Petitioner.

To Northern Pacific Railway Company.

2 Circuit Court of the United States for the Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
against
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

To the honorable the judges of the United States circuit court for the southern district of New York:

The petition of the American Trading Company, respectfully shows:

First. That your petitioner is a corporation duly created, organized and existing under and by virtue of the laws of the State of Connecticut, having its principal office and doing business in the city of New York, in the State of New York.

Second. That on or about August 15, 1893, P. B. Winston, The Farmers' Loan and Trust Company and others, as complainants, filed a bill of complaint, in equity, in the circuit court of the United States for the southern district of New York (as well as in the circuit courts of the United States in certain other districts) against the Northern Pacific Railroad Company, a corporation duly created, organized and existing under the laws of the United States, and that by orders entered on or about that day the said court and such other courts duly appointed Thomas F. Oakes, Henry C. Payne and Henry C. Rouse as receivers of said company and its property, and the said receivers duly qualified as such. That on and subsequently to the

3 18th day of October, 1893, the above named complainant, The Farmers' Loan and Trust Company, filed its bills of complaint against the Northern Pacific Railroad Company and others, in certain of the circuit courts of the United States, including the above named court, to foreclose certain mortgages on the property of the said railroad company, and that said courts duly entered orders thereon consolidating said two suits, and extending the receivership established in the suit first above mentioned to the consolidated cause and directing that the said consolidated cause proceed under the title of said foreclosure suit.

Third. That as such receivers the said Oakes, Payne and Rouse on and prior to the 20th day of September, 1894, and for a long time thereafter, were in possession of and controlled and operated the railroad and property of the defendant, The Northern Pacific Railroad Company, whose transportation line, including its main and leased lines, extended from Chicago, in the State of Illinois, and from Duluth, in the State of Minnesota, to Tacoma, in the State of Washington, and thence to China and Japan over a line of steamers known as the Northern Pacific line, which was operated in connection with said railroad. That for many years the said railroad company prior to the appointment of said receivers and said receivers after their appointment under traffic agreements and other arrangements with connecting railroads and with said line of steamers solicited, obtained and accepted merchandise and other

freights, from Newark, New Jersey, and other eastern points, for transportation over said railroad and said connecting roads and steamers to China and Japan and transported the same accordingly.

Fourth. That on or about the 18th day of September, 1894, your petitioner applied to the said receivers, through their general eastern agent in the city of New York, for a rate upon a pro-
4 posed shipment of pig lead from New York to Yokohama, Japan, and that at the time of such application your petitioner informed the said receivers that it was of vital importance that the said lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the petitioner to fulfill its proposed agreement for the sale thereof in Japan, which required its delivery there by a fixed date; that the said receivers at the city of New York, through said agent, thereupon named a rate for said shipment, and offered to transport the same at the rate mentioned and to forward the same from New York on or before September 29, and by their steamer sailing from Tacoma, Washington, on October 30.

Fifth. That upon receiving the said proposition your petitioner cabled its agents in Yokohama the price at which and the date by which it could deliver said lead there, and thereupon the agents of your petitioner in Yokohama made and entered into a valid and binding contract for the sale of said lead, which provided, however, that the same was to be delivered in Yokohama, by overland route and the most direct connection at San Francisco, Tacoma or Vancouver, and that in case of unusual or extraordinary delay in transit the contract was to be null and void.

Sixth. That in confirmation of the proposition for the transportation of said lead, hereinbefore mentioned, the said receivers of the Northern Pacific Railroad Company, at the city of New York, through their agent, on September 19, 1894, made an offer in writing, a copy of which is hereto annexed marked Exhibit A, to transport the said shipment of pig lead, to consist of not less than 400,000 pounds, from New York to Yokohama at $15 per ton, the same to be forwarded from New York on or before September 29th and from Tacoma by the Northern Pacific steamer sailing from
5 thence on October 30, 1894, in accordance with shipping instructions to be given by said receivers; that on September 20, 1894, your petitioner accepted the said offer in writing, a copy of which is hereto annexed marked Exhibit B, and that thereupon the said receivers of the Northern Pacific Railroad Company agreed and became bound to receive and transport the said lead according to said agreement, by their steamer sailing from Tacoma, Washington, on October 30, 1894.

That on September 22, 1894, the said receivers sent to your petitioner such shipping instructions in writing, a copy of which is hereto annexed marked Exhibit C.

Seventh. That the agent of said receivers expressed some doubt as to whether the said pig lead might not be contraband, in view of the war which was then pending between China and Japan, but said agent, having communicated with the Treasury Department a

Washington, D. C., as your petitioner is informed and believes, ascertained that the lead would be allowed to go forward and would not be stopped as contraband, and thereupon entered into the contract to ship the said lead. That as a matter of fact, the shipment of pig lead was not prohibited by the United States Treasury Department during the war between China and Japan; and at about the same time as the shipment herein mentioned, and on September 25th, 1894, your petitioner made another shipment of pig lead *via* Pacific mail steamers sailing from San Francisco, which was accepted, transported and delivered in Yokohama promptly and without trouble or delay.

Eighth. That on or about September 24th, 1894, the said agent of said receivers informed the petitioner that he declined to ship the said lead, and thereupon on September 24th, 1894, your petitioner sent him a notice in writing, a copy of which is hereto annexed marked Exhibit D, that it relied and insisted upon the fulfillment of the said contract and would hold said receivers liable for any damages resulting from the nonfulfillment thereof.

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Ninth. That thereupon the said receivers accepted the said shipment under said contract and the said lead consisting of 200 tons was, in accordance with the shipping instructions given by said receivers, delivered to the said receivers and loaded into their cars at Newark, New Jersey, on September 27th, 1894, and as your petitioner is informed and believes, was transported to Tacoma, Washington, and delivered there in time for shipment by the Northern Pacific steamer sailing on October 30. That the freight upon said lead from Newark to Yokohama, amounting to $3,360.05 was duly paid to said receivers by your petitioner.

Tenth. That through the negligence, delay, default and failure on the part of the said receivers to fulfill their agreement, the said lead was not shipped from Tacoma on the Northern Pacific steamer sailing October 30, nor until December 11, 1894, when the lead went forward on the Northern Pacific steamer "Victoria," sailing on that day, and did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, when it was properly due.

Eleventh. That during the said delay there had been a cessation of hostilites between China and Japan, the price of lead had fallen very considerably, and the purchaser of the lead hereinbefore mentioned, refused to accept the same, and declared the contract made with him for the sale of the said lead null and void, in consequence of the failure to promptly deliver the same in accordance with the requirements of said contract.

Twelfth. That the value of the said lead upon its delivery in Japan, on or about the 4th day of January, 1895, was $25,065.60 Mexicans, equivalent to $11,906.16 gold, and that your petitioner subsequently sold the same, realizing therefor the sum of $23,856.00 Mexicans, equivalent to $11,331.60 gold. That the price for which your petitioner had contracted to sell the same was $81,284.58 Mexicans, equivalent to $38,610.17 gold, and that in consequence of the breach of said agreement by said receivers and

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of their negligence, delay, default and failure to fulfill the same, your petitioner has suffered damage in the sum of $56,218.98 Mexicans, equivalent to $26,704.02 gold, with interest thereon from the fourth day of January, 1895, and that the said receivers by reason of the premises became and were indebted to your petitioners in said last-mentioned sum with interest as aforesaid, no part of which has been paid.

Thirteenth. That on the 12th day of May, 1896, a decree was duly entered in the above-entitled cause directing the sale, by Alfred L. Cary, special master, of all the railroad and property controlled and operated by the said receivers under the orders hereinbefore mentioned, and in and by the said decree it was expressly provided that the purchaser at such sale should take the property sold and receive the deed therefor, upon the express condition that such purchaser, his successors or assigns, should pay, satisfy and discharge any indebtedness, obligations or liabilities which should have been contracted or incurred by the receivers before delivery of possession of the property sold; and that if the purchaser of the said property should refuse to pay any such indebtedness, the person holding the claim therefor, upon fifteen days' notice to such purchaser, and his successors or assigns, might file his petition in this court to have such claim enforced against the property sold and the said court reserved jurisdiction of the cause for the purpose of enforcing the said provisions.

8 Fourteenth. That pursuant to the said decree and other similar decrees entered in similar suits in other jurisdictions, the above mentioned railroad property so controlled and operated by said receivers, was sold to the Northern Pacific Railway Company, a corporation duly created and existing under and by virtue of the laws of the State of Wisconsin, on the 25th day of July, 1896. That the said sale was afterward duly confirmed by a decree of this court made July 30, 1896, and similar decrees in such other jurisdictions, and that in pursuance thereof a conveyance of said property was duly made to the said Northern Pacific Railway Company, August 18, 1896, by the said special master, and also by the Northern Pacific Railroad Company, the Farmers' Loan & Trust Company, as trustee of the mortgages foreclosed, and by the receivers. That the said conveyances were made expressly subject to any unpaid indebtedness and obligations or liabilities contracted or incurred by the receivers before delivery of possession of said property sold, and subject also to all the conditions and reservations in the said decrees of foreclosure and in said decrees confirming said sale entered in the above entitled cause, including the reservation to this court, as well as the other courts, of power to re-take and re-sell the premises conveyed, or any part thereof, in case the said purchaser should fail to pay any sum required to be paid by it under said decrees.

Fifteenth. That the claim of your petitioner hereinbefore set forth has been presented to the said receivers and said Northern Pacific Railway Company, who have refused to pay the said claim or any part thereof, and that there now remains due and owing upon said

claim the sum of $26,704.02 with interest thereon from the fourth day of January, 1895.

9 Wherefore, your petitioner prays that its said claim may be enforced against the property of the said Northern Pacific Railway Company, purchased and received by it under the decree in the above entitled action, and other similar decrees, and that your petitioner may have such other or further relief, with its costs, as to the court may seem equitable and proper.

THE AMERICAN TRADING CO.
WM. H. STEVENS, *Treasurer.*

HOWARD VAN SINDEREN,
Solicitor, 15 Broad St., New York.

CITY AND COUNTY OF NEW YORK, *ss:*

William H. Stevens, being duly sworn, deposes and says: That he is the treasurer of the petitioner above named; that he has read the said petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

WILLIAM H. STEVENS.

Sworn to before me this 25th day of March, 1897.

PATRICK A. NOLAN,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

10 EXHIBIT A.

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 19, 1894.

American Trading Co., No. 182 Front street, city.

GENTLEMEN: I hereby confirm rate quoted you this day and accepted by you on shipment of pig lead for export to Japan, $15.00 per ton of 2000 lbs. shipment not to consist of less than 400,000 lbs. and to be forwarded from N. Y. on or before Sept. 29th, in accordance with shipping instructions given you by me and to be forwarded from Tacoma, Wash., via Northern Pacific steamer sailing from thence Oct. 30th. Kindly forward your acceptance of the above as early as possible. Thanking you for the favor, I remain,

Yours truly,
(S'g'd) GEO. R. FITCH.

EXHIBIT B.

SEPT. 20TH, 1894.

The Northern Pacific R. R. Co., New York city.

DEAR SIRS: In reply to your esteemed favor Sept. 19th, we beg to accept the rate quoted to us in your letter of Sept. 19th,
11 namely, on 200 tons pig lead, N. Y. to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs., to be forwarded from N. Y. on or before Sept. 29th, in accordance with shipping instructions to be given by you, and to be forwarded from Tacoma, Washington, via Northern Pacific steamer sailing from that port Oct. 30th. Kindly let us know as soon as possible the shipping instructions, so that we can forward them to our supplier, and oblige, with best respects,

Very truly yours,

THE AMERICAN TRADING CO.

(Signed) FRANK P. BALL.

12 EXHIBIT C.

Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 22, 1894.

American Trading Co., 182 Front St., city.

DEAR SIR: I hereby confirm routing given you over the telephone yesterday on your shipment of pig lead for export to Yokohama, Japan, as follows: To be shipped from Newark, N. J., via Penn. R. R., marked Anchor Line rail and lake, care Northern Pacific at Duluth, care A. O. Canfield, agent, N. P. R. R., Tacoma, Wash. Please advise me as soon as possible who the shippers will be, that I may order the cars and also see that same are rushed through without delay to connect with our steamer at Tacoma.

Yours truly,

(Signed) GEO. R. FITCH,
G. E. Agent.

A. H. P.

13 EXHIBIT D.

SEPT. 24TH, 1894.

Geo. R. Fitch, Esq., general eastern agent N. P. R. R., No. 319 Broadway, city.

DEAR SIR: Respecting notice just received by us through your Mr. Post, that your company now decline to ship for us via Tacoma the 200 tons of pig lead specified in your contract with us under date Sept. 19th, and confirmed by us under date Sept. 20th, we beg

to advise that we shall hold your company responsible for any loss or damage we may suffer from the non-fulfillment of this contract with you. We remain, dear sirs,

Very truly yours,

THE AMERICAN TRADING CO.

(Signed) WM. H. STEVENS, *Treas.*

STATE OF NEW YORK, }
So. Dist. of N. Y., City and County of New York, } ss.:

William H. Bruder, being duly sworn, says, he is of the age of 21 years and upwards and resides at No. 138 West 67th street, in the city of New York; that on the 26th day of March, 1897, between the hours of 12 m. and 1 p. m. at No. 15 Broad street (Mills building) in the city of New York, he served the within petition and notice of motion on the Northern Pacific Railway Company by delivering to and leaving with Charles F. Coaney, Esq., the secretary thereof, a copy of the same; that at the time of such service
14 deponent says he knew the person served as aforesaid to be Charles F. Coaney, Esq., the secretary of said corporation.

WM. H. BRUDER.

Sworn to before me this 27th day of March, 1897.

PATRICK A. NOLAN,

[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

U. S. circuit court, Filed April 16th, 1897, John A. Shields, clerk.

At a stated term of the circuit court of the United States for the southern district of New York, held in the city of New York on the 16th day of April, 1897.

Present: Hon. E. Henry Lacombe, circuit judge.

THE FARMERS' LOAN AND TRUST COMPANY }
against
NORTHERN PACIFIC RAILROAD COMPANY ET AL. }

Upon reading the petition of the American Trading Company, verified March 25, 1897, praying to have its claim for damages therein set forth enforced against the property of the Northern Pacific Railway Company purchased and received by it under
15 the decree in this cause, and the notice of motion dated March 26, 1897, for leave to file the said petition and for the enforcement of said claim, with proof of service of the said petition and such notice upon the Northern Pacific Railway Company, and the said Northern Pacific Railway Company having appeared by Messrs. Sullivan & Cromwell, their solicitors; and after hearing counsel for said petitioner, in favor of said application, and counsel

for said Northern Pacific Railway Company, in opposition thereto, it is hereby

Ordered, that the said petition be filed, and that the Northern Pacific Railway Company file its answer thereto within twenty days from this date; and it is hereby

Further ordered, that the issues be tried before a jury in the common-law branch of this court, and that upon the filing of said answer a further order may then be entered framing such issues for trial accordingly.

E. HENRY LACOMBE,
U. S. Circuit Judge.

Approved as to form April 17, 1897.
SULLIVAN & CROMWELL,
Solicitors for Northern Pacific R'y Co.

16 Circuit Court of the United States for the Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
against
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

The Northern Pacific Railway Company, answering the petition of the American Trading Company herein, upon information and belief, says:

First. It admits the allegations contained in the paragraphs of said petition numbered first, second, thirteenth, fourteenth and fifteenth, except that it denies that any sum is due or owing to the petitioner from the receivers of the Northern Pacific Railroad Company or from this respondent, as in paragraph numbered fifteenth alleged.

Second. It admits that the receivers of the Northern Pacific Railroad Company, as alleged in said petition, were on and prior to the 20th day of September, 1894, and for a considerable time thereafter, in possession of and controlled and operated the railroad and property of the said Northern Pacific Railroad Company; and admits that its transportation line extended from Duluth in the State of Minnesota to Tacoma in the State of Washington; but denies that said receivers ever had any control over any line of steamers from Tacoma to China or Japan; but admits that they received for transportation and transported to Tacoma, merchandise for further transportation upon steamers running from said port to various places; and admits that they accepted merchandise and
17 other freights at Duluth for transportation over said line to Tacoma to be delivered to vessels at that port for further transportation; but denies that they ever entered into any agreements for the transportation of merchandise from Newark, New Jersey, or any other eastern point to the eastern terminus of their said line, and denies that they ever entered into any contract for the transportation of merchandise or other freights beyond the terminus of their said line at Tacoma.

Third. It denies that said receivers ever agreed or offered to transport any merchandise for the petitioner from New York or by any steamer from Tacoma, as in paragraph fourth of said petition alleged; but avers the fact to be that on or about the 18th day of September, 1894, said petitioner applied to one George R. Fitch, who was then acting as agent for said receivers and for certain other persons and corporations at the city of New York, for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan; and that, if said agent made any agreement for the transportation of said lead to Duluth or from Tacoma to Japan, any such agreement was not made on behalf of said receivers, but was made on behalf of some other person or corporation; and avers that the said agent had no authority to make any agreement on behalf of said receivers for any transportation of said lead except over the railways then in the possession of said receivers, and that said receivers never had any authority to make and never did make any contract for the transportation of said lead except over the lines of railroad in their possession.

Fourth. This respondent has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraph of said petition numbered fifth, and therefore leaves said petitioner to such proof thereof as it may be advised.

18 Fifth. It denies that said receivers on September 19, 1894, or at any other time, through their agent or otherwise, made any offer in writing to transport any shipment of pig lead from New York to Yokohama; but avers that if any such offer was made by any person acting as the agent of said receivers, the same was not made for said receivers except in so far as transportation over the lines of railroad in the control of said receivers was concerned, and that the said agent, if he made any offer for the transportation of said lead over any other lines or by any other means, was acting as the agent of other persons or corporations and not for the said receivers; of all of which petitioner had due notice.

Sixth. This respondent denies that in any transactions respecting the shipment of said lead alleged in paragraphs of said petition numbered seventh, eighth, and ninth, said receivers through their agent or otherwise, had any concern or did anything whatsoever except in respect of the transportation thereof over the lines of railroad in their possession, and except that this respondent admits that said lead was received by the said receivers upon their said line at Duluth aforesaid, and was transported to Tacoma, Washington, and delivered there in time for shipment by the steamer sailing on October 30th, 1894, and avers that the person designated in said paragraph of said petition as the agent of said receivers, was George R. Fitch, aforesaid, who was agent for other persons and corporations, and that with regard to all of said matters concerning the transportation of said lead over other parts of the route than the lines of railroad in possession of said receivers he acted as agent for such other persons and corporations and not for said receivers; of all of which said petitioner had due notice.

Seventh. This respondent denies that through the negli-
19 gence, default or failure in any way on the part of said receivers to fulfill their agreement, said lead was not shipped from Tacoma on October 30, 1894, as alleged in the paragraph of said petition numbered tenth; and avers that said receivers duly received said lead at Duluth and transported the same to Tacoma without delay and in time for shipment there by the steamer sailing October 30, 1894, and that if any delay occurred in the shipment of said lead such delay was due to the conduct of other persons or corporations and not to the conduct of said receivers.

Eighth. This respondent has no knowledge or information sufficient to form a belief as to the truth of the allegations in said petition in paragraphs numbered eleventh and twelfth contained, and therefore leaves said petitioner to make such proof thereof as it may be advised.

Ninth. This respondent further alleges that at the time in the petition mentioned, said receivers had various traffic contracts with various corporations engaged in the business of transportation of goods from and to points in the line of the railroad then in the possession of said receivers and operated by them, under which goods were received by said receivers from carriers at points in their line and transported to other points in their line, and goods transported over the lines operated by said receivers, were delivered to the various carriers with whom said receivers had such contracts, and transported by them to points beyond the lines of railroad operated by said receivers; that for convenience the same persons in different places acted as agents both of said receivers and of such other carriers in the transportation of goods from and to points not reached by the lines operated by said receivers, but passing over their lines or some portion thereof; that among such carriers were the Anchor line, so called, engaged in the transportation of goods from New
20 York and other eastern points to points on the Lakes, and the Northern Pacific Steamship Company, a corporation engaged in the transportation of goods from Tacoma, Washington, to Japan and other oriental points; that one George R. Fitch was at the time aforesaid, agent at New York for said receivers and for said Anchor line and said Northern Pacific Steamship Company, and was accustomed to make contracts for the transportation of goods from New York and other eastern points to points reached by the steamers of said steamship company passing over the lines operated by said receivers, and that in making such contracts he acted for said Anchor line in contracting for the transportation of goods from eastern points to Duluth, for said receivers in contracting for the transportation of goods from Duluth to Tacoma, and for said Northern Pacific Steamship Company in contracting for the transportation of goods beyond Tacoma, but in no case did he act for any of the said carriers in contracting for the transportation of goods except upon the lines controlled or operated by them; that said receivers never exercised any control whatsoever, or had any interest in the transportation of goods by the vessels of said steamship company and never did nor were authorized to assume any responsibility therefor, and

that the said agent never did nor undertook to contract for said receivers in respect of any transportation except over the lines of railway controlled by them; that the petitioner applied to said Fitch in regard to the transportation of said lead and well knew that said Fitch could not make and did not make on behalf of said receivers any contract for the transportation of the same except over their lines, nor did nor could make any offer on behalf of said receivers to transport the same except over the lines controlled by them; that said lead was duly, punctually and safely transported by said receivers over their lines and delivered at Tacoma to the said steamship company, and that if any delay occurred in the trans-
21 portation thereof, the same occurred after the delivery to said steamship company, and said receivers are not and never were responsible therefor.

Tenth. That by the custom of carriers, when goods are furnished for transportation, the terms and conditions upon which such goods shall be transported are expressed by a bill of lading issued after such goods have been so received, and such transportation is subject to the terms and conditions in such bill of lading expressed; that a bill of lading containing such terms and conditions as hereinafter set forth was furnished to petitioner for the transportation of said lead, and the conditions of the liability of the carriers thereunder as expressed therein, were and are binding upon the petitioner, as well as upon the carriers; that petitioner duly accepted said bill of lading and made use thereof and did not protest against the same nor object to any other provisions contained therein, and that none of the carriers of said lead are responsible otherwise than as in said bill of lading expressed.

Eleventh. This respondent further alleges that the contract for the transportation of said lead was contained in a bill of lading expressing the terms upon which the same was to be and was transported, which bill of lading was delivered to the said petitioner and accepted by it as expressing the terms and conditions of the transportation of said lead; that in and by said bill of lading it was expressly stated that said agent signed for the carriers therein named severally and not jointly; and it was further provided that no carrier should be liable for loss or damage not occurring on its own road or its portion of the through route, nor after such property should be ready for delivery to the next carrier; and this respondent avers that if any loss, damage or delay occurred to petitioner in the transportation of said lead, the same occurred after
22 said lead had been delivered by said receivers to said Northern Pacific Steamship Company, which was the next carrier, and not upon the receivers' portion of the through route.

Twelfth. That it was in and by said bill of lading further provided with respect to the service after delivery at the port of Tacoma, that the carrier should not be liable for loss or damage occasioned by arrest and restraint of princes, rulers or people; that the said lead was duly delivered on October 30, 1894, at Tacoma aforesaid to said Northern Pacific Steamship Company and was by it duly loaded aboard its steamer sailing that day; but that the Government of the

United States refused to allow said steamer to sail carrying said lead and compelled said steamship company to unload the same in order to obtain clearance for said vessel; that in accordance with said direction of said Government said lead was unloaded, and that all delay in the transportation of the same arose from that cause and not otherwise; and that under the bill of lading the carrier was not and is not responsible therefor.

Thirteenth. That in and by said bill of lading it was further provided that said lead was accepted for transportation subject to delay, and that any loss to the petitioner which occurred in the course of such transportation was due solely to delay in the transportation thereof from Tacoma, Washington, to Japan; and that no carrier of said lead is responsible for any damages arising from such cause.

Wherefore this respondent prays that the said petition be dismissed with costs.

NORTHERN PACIFIC RAILWAY CO.,
By WM. NELSON CROMWELL,
Associate Counsel.

SULLIVAN & CROMWELL, *Solicitors.*

23 SOUTHERN DISTRICT OF NEW YORK, } *ss:*
City and County of New York, }

Charles F. Coaney being duly sworn, deposes and says: That he is the secretary of the respondent above named; that he has read the said answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CHARLES F. COANEY.

Sworn to before me this 17th day of May, 1897.
JOHN J. NERNEY,
Notary Public, Kings Co.

Cert. filed in New York Co., N. Y.

Endorsed: U. S. circuit court. Filed May 17, 1897. John A. Shields, clerk.

24 Circuit Court of the United States, Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY }
against
THE NORTHERN PACIFIC RAILROAD COMPANY. }

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

By an order made at a stated term of the circuit court of the United States, for the southern district of New York, held in the city of New York, on the 16th day of April, 1897, and duly entered

and filed, the American Trading Company was allowed to file its petition herein verified March 25, 1897, praying to have its claim for damages therein set forth enforced against the property of the Northern Pacific Railway Company purchased and received by it under the decree in this cause; and the Northern Pacific Railway Company was directed to file its answer to the petition; and it was thereby further ordered that the issues be tried before a jury, in the common law branch of the court, and that upon the filing of the said answer a further order might be entered framing such issues for trial accordingly.

The petition and answer were duly filed accordingly and
25 now remain on file, but no order framing the issues for trial has ever been made; and, in lieu thereof, the following is a statement of facts agreed upon by the Northern Pacific Railway Company and by the American Trading Company, upon which the case is submitted to the decision of the court, and trial by jury is hereby waived:

1. In September, 1894, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse were receivers of the Northern Pacific Railroad Company, under an order made in a suit bearing the same title as the present suit, in the United States circuit court, for the eastern district of Wisconsin, to which this suit is ancillary. Under that order, the receivers were authorized to continue, and were continuing to carry on the business of the railroad in their charge.

2. The line of railroad in the possession of the receivers extended from Duluth, Minnesota, to Tacoma, Washington. The receivers had contracts with various carriers reaching points on their line, by which through bills of lading were issued from and to points not upon the line of the receivers' railroad, where the freight passed over some part of that line in transit. Among the carriers with whom the receivers had such arrangements was the Northern Pacific Steamship Company. This was an English company, operating a line of steamers between Tacoma and points in Japan and China, including Yokohama. The contract between the steamship company and the receivers was the contract originally made on March 30, 1892, between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company, and ratified and adopted by the receivers under the authority of an order of the circuit court of the United States made on September 13th, 1893. A copy of the contract is hereto annexed marked Exhibit A.

26 The receivers held no stock in the steamship company and had no other express contract relation with the steamship company. This stipulation is not to be accepted as an admission by the railroad company or the receivers or their counsel, that there were any relations between the receivers and the steamship company other than those growing out of the facts herein agreed upon.

3. For convenience in transacting their freight business in the eastern part of the United States, the receivers maintained an office in the city of New York, which was, in September, 1894, in charge of one George R. Fitch, who was their general eastern agent, and made arrangements for the transportation of freight over the receiv-

ers' line of railway and connections, including transportation to China and Japan.

At the time of the transactions referred to in this statement of facts, the said Fitch had not received, nor did he ever receive any direct or independent appointment or authority from the Northern Pacific Steamship Company to act as agent of that company. His only authority as agent of the steamship company was that created by, or arising from, the contract, Exhibit A. Fitch knew that an arrangement had been concluded by the receivers and the steamship company by which contracts for through shipment to Yokohama might be made by the agents of the receivers, and through bills of lading issued, and he had been instructed by the receivers to solicit freight for through transportation upon bills of lading of which Exhibit C, hereto annexed, is a copy; but Fitch did not know the terms of the contract between the steamship company and the receivers, and the trading company did not know what company operated the steamships between Tacoma and Yokohama, or that the steamship company was a separate and independent company, or that there was any contract between the receivers and the steamship company.

27 It is further stipulated that Fitch had no express general authority to make contracts for through transportation except as provided by the said bills of lading; and no express authority to make the contract in question, unless such express authority be found in the telegrams, of which copies are hereinafter set forth; that the American Trading Company did not know the terms of his express authority; and that this stipulation is not to be taken as an admission by the railroad company or the receivers or their counsel, that his implied authority was greater than his express authority.

4. The American Trading Company is, and was in September, 1894, a corporation organized under the laws of the State of Connecticut, having its principal office in the city of New York, and carried on a general commercial business with Asiatic ports.

5. In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfill a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York on or before September 29th, and *via* the Northern Pacific steamer "Tacoma" sailing from Tacoma October 30, 1894.

6. Thereupon the trading company cabled to its agents at Yokohama naming a price and a date at which the lead could be delivered there; and thereupon its agents in Yokohama made

28 a contract for the sale of the lead, which contract provided that it should be delivered in Yokohama by overland route, and the most direct connection at San Francisco, Tacoma or Van-

couver, and that in case of unusual or extraordinary delay in transit the contract should be null and void. Neither Fitch nor the receivers knew until September 24th, that any contract for the sale of lead in Japan had been concluded by the trading company, and, except as hereinbefore and hereinafter stated, they never received any information in regard to its terms, as made or proposed. Upon the conclusion of its Japanese contract the trading company purchased two hundred tons of pig lead in bond from the Balbeck Smelting and Refining Company.

7. On September 19, 1894, Fitch, in confirmation of his previous statement, wrote and sent to the trading company the following letter:

29 Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 19, 1894.

American Trading Co., 182 Front St., city.

GENTLEMEN: I hereby confirm rate quoted you this day and accepted by you on shipment of pig lead for export to Japan, as follows:

Pig lead New York to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs., and to be forwarded from New York on or before Sept. 29th, in accordance with shipping instructions given you by me and to be forwarded from Tacoma, Wash. *via* Northern Pacific steamer sailing from thence October 30th. Kindly forward your acceptance of the above as early as possible. Thanking you for the favor, I remain,

Yours truly, GEO. R. FITCH,
G. E. Agent.

The trading company wrote and sent in reply (accepting the proposition) the following letter:

SEPT. 20TH, 1894.

The Northern Pacific R. R. Co., New York city.

DEAR SIRS: In reply to your esteemed favor Sept. 19th, we beg to accept the rate quoted to us in your letter of Sept. 19th, namely, on 200 tons pig lead, N. Y. to Yokohama, Japan, $15.00 per ton of 2000 lbs., shipment not to consist of less than 400,000 lbs., to be forwarded from N. Y. on or before Sept. 29th, in accordance with ship-
30 ping instructions to be given by you, and to be forwarded from Tacoma, Washington *via* Northern Pacific steamer sailing from that port Oct. 30th. Kindly let us know as soon as possible the shipping instructions, so that we can forward them to our supplier, and oblige, with best respects,

Very truly yours,
THE AMERICAN TRADING CO.
(Signed) FRANK P. BALL.

On September 22, 1894, Fitch wrote and sent to the trading company the following letter, giving shipping instructions:

31 Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 22, 1894.

American Trading Co., No. 182 Front St., city.

DEAR SIR: I hereby confirm routing given you over the telephone yesterday on your shipment of pig lead for export to Yokohama, Japan, as follows:—To be shipped from Newark, N. J. via Penn. R. R. marked Anchor Line rail and lake care Northern Pacific at Duluth care A. O. Canfield, agent N. P. R. R., Tacoma, Wash. Please advise me as soon as possible who the shippers will be that I may order the cars and also see that same are rushed through without delay to connect with our steamer at Tacoma.

Yours truly, GEO. R. FITCH,
G. E. Agent.

A. H. P.

8. Before naming a rate for the transportation of the lead, Fitch had expressed some doubt as to whether it might not be excluded from transportation as contraband in view of the war then existing between China and Japan. In fact, the shipment of pig lead was not prohibited by the Treasury Department at Washington, during the war between China and Japan, and on September 25th, 1894, the trading company made another shipment of pig lead via Pacific Mail steamer sailing from San Francisco, which was, without trouble or delay, transported and delivered in Yokohama.

9. In September, 1894 J. B. Baird was the second assistant
32 general freight agent of the receivers, and J. M. Hannaford was the general freight agent of the receivers; and telegrams of which the following are copies, relating to proposed shipments of pig lead, including the shipment in question, passed between the said Fitch and Baird and Hannaford, but were not disclosed to the American Trading Company:

NEW YORK, *September* 14, 1894.

J. B. Baird, second A. G. F. A.:

Please wire quick lowest rate one hundred ton lots pig lead from Chicago and Duluth to Yokohama.

GEO. R. FITCH.

SEPTEMBER 14, 1894.

Geo. R. Fitch, 319 Broadway, New York, N. Y.:

You may quote as low as sixty cents from Duluth and seventy cents from Chicago to Yokohama on pig lead in one hundred ton lots. Get more if possible.

J. B. BAIRD.

SEPTEMBER 17, 1894.

New York, September 17, 1894.

J. B. Baird, 2d A. G. F. A.:

Your wire fourteenth. Shall I accept fifty cents on pig lead Duluth to Yokohama. Also name lowest rate on two hundred tons St. Louis to Yokohama.

GEO. R. FITCH.

SEPTEMBER 18TH, 1894.

Geo. R. Fitch, 319 Broadway, New York:

Cannot accept less than sixty cents on pig lead Duluth to Yokohama. Will quote from St. Louis later.

0.900. J. B. BAIRD. WDB.

33 SEPT. 19TH, 1894.

G. R. Fitch, 319 Broadway, New York:

You may quote seventy cents on the pig lead in one hundred ton lots St. Louis to Yokohama. Advise if accepted.

0.900. J. B. BAIRD. WDB.

NEW YORK, *September* 21, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:

Wire best rate two hundred fifty tons pig lead Duluth to Shanghai.

GEO. R. FITCH.

SEPTEMBER 22, 1894.

G. R. Fitch, 319 Broadway, New York:

N. P. Steamship Co. have now declined to handle lead for Yokohama, Kobe, Hong Kong or Shanghai. Please cancel your quotation.

0.900. J. B. BAIRD. WDB.

On September 24, 1894, Fitch informed the trading company that he declined to ship the lead upon the ground that it might be contraband of war, and thereupon on the same day the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfill the contract, which letter is as follows:

SEPT. 24TH, 1894.

Geo. R. Fitch, Esq., general eastern agent N. P. R. R., No. 319 Broadway, city.

DEAR SIR: Respecting your notice just received by us through your Mr. Post, that your company now decline to ship for us via Tacoma the 200 tons of pig lead specified in your contract with us under date Sept. 19th, and confirmed by us under date Sept.

20th, we beg to advise that we shall hold your company
34 responsible for any loss or damage we may suffer from the non-fulfilment of this contract with you.

We remain, dear sirs,

Very truly yours,

THE AMERICAN TRADING CO.

(Signed) WM. H. STEVENS, *Treas.*

Thereupon, telegrams of which the following are copies were sent and received as indicated, in relation to the shipment in question but were not disclosed to the trading company.

NEW YORK, *Sept.* 24, 1894.

J. B. Baird, N. P. R'y, St. Paul, Minn.:

Shipment lead to Yokohama is now being made shippers refuse to accept withdrawal, we have given shippers written contract.

GEO. R. FITCH.

NEW YORK, *Sept.* 24, 1894.

J. M. Hannaford, N. P. R'y, St. Paul, Minn.:

Have notified American Trading Co., that shipment will be refused. They state they will hold us to contract. They are shipping hundred tons from Denver to Yokohama by steamer City of Rio from San Francisco, Oct. fourth and expect to forward this shipment same way, will charge us difference in rate. Advise quick.

GEO. R. FITCH.

SEPT. 25, 1894.

G. R. Fitch, 319 Broadway, New York:

Your wire this date to Mr. Hannaford: Dodwell, Carlill & Co. have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by you and say how it will be routed. Think we should receipt for lead subject to delay.

0/900. J. B. BAIRD. WDB.

35 Dodwell, Carlill & Co., mentioned in the last telegram represented the steamship company.

10. Thereupon the refusal to accept the shipment was withdrawn, and the shipment was made under the contract, and the lead, consisting of two hundred tons, was, in accordance with the shipping instructions given in Fitch's letter of September 22, 1894, shipped at Newark, New Jersey, on September 27th, 1894, by the Balbeck Smelting and Refining Company for account of the American Trading Company. This was the first shipment ever made by the American Trading Company over the line of the Northern Pacific Railroad Company and its connecting carriers. The shipment was made in bond for exportation at Tacoma, and was secured upon the cars by Government locks and customs seals. On the afternoon of September 27, 1894, the shipment left Newark, and started on its journey,

and was transported via the Anchor line, a carrier operating between eastern points and points on the Lakes, to Duluth, and carried from Duluth via the receivers' railroad to Tacoma, which it reached in time for shipment by the steamship company's steamer "Tacoma," sailing October 30, 1894. On September 28th, a cheque for the freight upon the lead from Newark to Yokohama was handed by the trading company to Fitch, of which cheque, with its indorsements the following is a copy:

The American Trading Co.

Cheque.

NEW YORK, *Sept.* 28" 1894. No. 6096.

The National Bank of North America

Pay to the order of the Northern Pacific R. R. $3360.05. Thirty three hundred sixty & 05/100 dollars.

THE AMERICAN TRADING CO.
WM. H. STEVENS, *Treas'r.*

A. PROCTOR, JR.,
Cashier.

36

Endorsements.

For deposit in
Ninth National Bank
to Cr. of Geo. R. Fitch,
Gen. east'n ag't.
Ninth Nat'l Bank,
Endorsement
guaranteed
of the City of N. Y.

The amount of the cheque was credited at the Ninth national bank to the account of "George R. Fitch, general eastern agent," which was the style of the account opened by Fitch as agent of the Northern Pacific railroad; and the account was never drawn upon in favor of the Northern Steamship Company, but all through freights received were deposited to the credit of this account and remitted to the railroad company, or its receivers, and were divided and distributed by them under their contract with the steamship company.

II. On September 28, 1894, a shipping receipt for the shipment was issued to the Balbeck Smelting and Refining Company, of which shipping receipt a copy is hereto annexed marked Exhibit "B," and was delivered by the Balbeck Smelting and Refining Company to the American Trading Company, and was forthwith surrendered by the trading company to Fitch.

A bill of lading in the usual printed form, a copy of which is hereto annexed marked "C," was subsequently issued by Fitch to the American Trading Company. It was received by a clerk of the

trading company without stated objection to its terms, but was not read or examined by him or by any officer of the company, and was immediately hypothecated with the Hong Kong and Shang-
37 hai bank, as collateral security for moneys borrowed thereon by the trading company. The original of the bill of lading was negotiable, and did not have stamped upon it the words "not negotiable, shipper's copy," which appear on the shipper's copy hereto annexed, but was similar to the shipper's copy in all other respects.

On September 29th, 1894, Fitch sent a copy of this bill of lading to Dodwell, Carlill & Co., with a letter (not disclosed to the American Trading Company) of which the following is a copy:

38 Northern Pacific Railroad Company.

Thomas F. Oakes, Henry C. Payne, Henry C. Rouse, receivers.

Geo. R. Fitch, general eastern agent, 319 Broadway.

TRAFFIC DEPARTMENT, NEW YORK CITY, *Sept.* 29, 1894.

Dodwell, Carlill & Co., Tacoma, Wash.

GENTLEMEN: I hand you herewith my B/L 1507 covering shipment of pig lead for export to Amer. Trading Co. Yokohama, Japan. As I have previously advised you, I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. Tacoma sailing Oct. 30th. Will you kindly see that this connection is made, without fail.

Yours truly,

(S'g'd) GEO. R. FITCH, *G. E. A.*

The previous letter of advice referred to by Fitch in the foregoing letter is lost and no copy of it exists. It appears, however, from the following letter of acknowledgment to have borne date on September 27th.

TACOMA, WN., *October 2nd*, 1894.

George R. Fitch, Esq., G. E. A., N. P. R. R., 319 Broadway, New York.

DEAR SIR: We beg to own receipt of and thank you for your favor of the 27th ultimo, advising the engagement of 40 tons condensed milk and 225 tons pig lead for our steamer "Tacoma," sailing hence the 30th instant. Please keep us frequently advised of freight engagements, as we have applications now for more
39 space for flour than our steamers will carry, and we are shutting out considerable of the latter every voyage.

Yours truly,

(Sig.) *p. p.* DODWELL, CARLILL & CO.
A. T. PRICHARD.

12. At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company and was loaded upon the "Tacoma," the vessel of the steamship company, which was to sail on October 30th; but about four o'clock in the afternoon of that day, the deputy collector of the United States at that port refused to clear the vessel while the lead was on board upon the ground that it was contraband of war, and telegraphed to the collector of Port Townsend for instructions. On the following day, which was the 31st of October, the deputy collector at Tacoma received a telegram from the collector of the United States at Port Townsend, which was as follows:

"Department advises that unless you have evidence tending to show that the pig lead now at Tacoma and referred to in your telegram of yesterday is to be used in the war between China and Japan, no reason is perceived why shipment should not be permitted."

In the meantime, however, the master of the vessel unloaded the lead, which delayed the ship until 9 a. m. on the morning of October 31st, when he sailed without it.

The petitioner was not notified of the delay in the transhipment of the lead until November 5th, 1894.

The next vessel on the line was the "Sikh," which did not belong to the steamship company, but was a chartered ship. Her captain declined to take the lead on the ground that it was contraband. The Northern Pacific Steamship Company cabled to the owners of the vessel at London, and they adhered to the position taken by the captain.

40 13. The lead went forward on the next vessel, the "Victoria," on December 11, 1894, and did not arrive in Yokohama until on or about January 4, 1895, instead of on or about November 18, 1894, when it would have arrived had it gone forward on the 30th of October, 1894.

14. In the meantime hostilities between China and Japan had ceased, the price of lead had fallen very considerably, and the purchaser of the shipment refused to accept it and declared the contract null and void in consequence of the failure to deliver it promptly in accordance with the terms of the contract.

15. The price of the lead under the contract would have been $38,610.17. The lead was delivered to the trading company in Yokohama upon the surrender of the bill of lading, and in consequence of the failure of its vendee to accept the lead, the trading company sold it for $11,331.60, which was the best price obtainable therefor, at the time of sale. The sale was made as soon as a purchaser could be found. The value of the lead on January 4, 1895, in Japan, was $11,906.16.

16. Upon the case arising on the foregoing facts, the American Trading Company has duly presented to the receivers and to the Northern Pacific Railway Company, its claim amounting to the sum of $26,704.02, with interest thereon from the 4th day of January, 1895, and has demanded payment thereof, but payment has been refused, and no part thereof has been paid.

All of which is respectfully submitted.
Dated New York, March 11, 1901.

HOWARD VAN SINDEREN,
Attorney for the American Trading Company, the Intervening Petitioner.

WILLIAM NELSON CROMWELL,
Attorney for the Northern Pacific Railway Company.

41 EXHIBIT A.

Memorandum of agreement, made and entered into at Chicago, Illinois, United States of America, this thirtieth (30th) day of March, 1892, between the Northern Pacific Railroad Company, first party, and the Northern Pacific Steamship Company, of Govan, Glasgow, Scotland, second party.

That whereas, the second party desires to establish a line of steamships between Hong Kong and the ports of China and Japan and the city of Tacoma, Washington, United States of America, said steamships to be suitable for the intended trade between the ports of China and Japan, and other Asiatic ports, and points in the United States of America and Canada and Europe, and

Whereas, the first party is engaged in operating a railroad in the northern portion of the United States of America, and is desirous of forming an alliance for the purpose of controlling passenger and freight traffic and other business between the above mentioned points,

Now therefore, it is hereby mutually covenanted and agreed between the parties hereto as follows:

1. Establishment of steamship line.

(*a.*) The second party shall procure, establish and commence to run a monthly line of steamships between Hong Kong and the ports of China and Japan and the port of Tacoma, Wash., within six months from date hereof. Said steamships shall be capable of carrying three thousand (3,000) tons of measurement cargo (inclusive of accommodation for steerage passengers) and shall have a speed of between ten (10) and eleven (11) knots per hour, with fair saloon passenger accommodations, and be suitable for handling tea, rice and general merchandise or other cargo or passengers that may be offered for transportation between the Asiatic ports referred to and points in the United States of America, Canada and Europe.

42 (*b.*) The second party shall have the right, should there be insufficient traffic offering during the slack season (January to April inclusive), to run one steamship every two months in place of monthly.

(*c.*) If the traffic offered shall increase so that it is practicable to run more steamers than provided for by this agreement, either by shortening schedule time or running extra steamers, the second party shall supply them.

(*d.*) The second party shall have the right, should it be deemed advisable, or become expedient in order to meet competition, to call at Honolulu and or Victoria, B. C., on the voyage to and from Tacoma, Washington, and also to send its steamships on to San Francisco after leaving Tacoma on the inward voyage, returning to Tacoma before leaving upon the outward trip.

2. Division of through rates on overland cargo.

(*a.*) The through rate by steamship and rail shall be divided equally between the parties hereto, provided that:

(*b.*) The first party shall receive a minimum of seventy-five (75) cents per hundred (100) pounds to and from points east of Chicago which are ordinarily termed eastern common points, and which include in the main: New York, Troy, Albany, Schenectady, Buffalo (New York), Boston, Fitchburg, Gloucester, Lawrence, Salem, Springfield, Worcester (Mass.), Hartford, New Haven (Conn.), Baltimore (Md.), Philadelphia, Harrisburg, Pittsburg (Pa.), Cleveland, Cincinnati, Toledo (Ohio), Indianapolis (Ind.), Detroit, Port Huron (Mich.), Paterson (N. J.), Concord, Manchester, Nashua (N. H.), Providence (R. I.), New Orleans (La.), Memphis (Tenn.), Toronto, Brockville, Kingston, Ottawa, Cornwall, Hamilton, London, Prescott (Ontario), Montreal, Quebec (Que.).

43 (*c.*) The first party shall receive a minimum of fifty (50) cents per (100) hundred pounds to and from points ordinarily termed western common points, and which include in the main: Chicago (Ill.), Minneapolis, St. Paul, Duluth (Minn.), Omaha (Neb.), Council Bluffs, Sioux City, Dubuque, Keokuk (Iowa), Leavenworth, Atchison (Kansas), Kansas City, St. Joseph, St. Louis (Mo.), Milwaukee (Wis.), Winnepeg (Man.).

(*d.*) Any reduction in the through rate from the above basis shall be borne by the second party until the minimum accruing to the steamships shall reach 35 cents (thirty-five) per hundred (100) pounds. Should it become necessary or advisable to accept through rates lower than on above basis, such lower basis shall be first agreed upon between the two parties hereto, and after deducting from the agreed through rate such a*b*ritraries as are demanded by the connections of the first party, the balance of the through rate shall be prorated in the proportion of: To the first party fifty (50) cents, and to the second party thirty-five (35) cents.

(*e.*) Should it become necessary in order to meet the competition of the Canadian Pacific Railway and Steamship Line or other competing lines in the transportation of raw cotton or cotton piece goods (domestics) destined to Asiatic ports, the first party is hereby authorized to reduce the minimum accruing to the second party to a basis of twenty-five (25) cents per hundred pounds to meet such competition.

(*f.*) On raw silk and silk piece goods and other valuable cargo requiring equal to passenger train service, there shall first be deducted from the through rate one dollar ($1.00) per hundred pounds to be allowed the first party for such expedited service, and the remainder of through rate to be divided as provided in article 2d, and paragraphs A and B.

44 3. Division of through rates on overland passenger traffic.

The through rate by steamship and rail shall be divided as follows :

After deducting the arbitraries to be paid out to connecting lines, the balance shall be divided and the first party shall receive eighteen (18) per cent., and the second party eighty-two (82) per cent., with minimum of thirty-five (35) dollars gold, to the first party.

4. Traffic (cargo and passenger) between Asiatic and Pacific Coast ports.

(*a.*) All traffic between the Pacific Coast and Asiatic ports shall be for the sole benefit of the second party.

(*b.*) The second party wherever possible shall forward such cargo by the railroads of the first party, or by the railroads or steamship lines controlled by the first party, at rates to be agreed upon, which shall not exceed twenty-five (25) per cent. of the through rate per steamship freight list and with a minimum to the first party or its connections of one dollar ($1.00) gold per ton steamships freight list.

(*c.*) The first party shall assist the second party in obtaining low rates between Tacoma and other Pacific Coast points on cargo handled at Tacoma to or from connecting lines.

(*d.*) On cargo from which the first party receives no benefit, the second party will pay to the first party the actual cost of labor service at Tacoma, which shall not exceed twenty-five cents (25) cents per ton.

(*e.*) On passenger traffic to or from Pacific Coast points other than Tacoma, and interior points not on or reached by the railroad of the first party, the second party shall pay all cost of connections to or from Tacoma.

45 5. Asiatic cargo to western local points.

(*a.*) For cargo in not less than car-load lots of (24,000) pounds gross weight or tons, 25 measurement of forty (40 cubic feet) from Asiatic ports to points on the line of the first party between Tacoma and St. Paul, the second party may issue through bills of lading at the current rate of freight on similar goods to parallel points on competing lines.

(*b.*) For cargo in less than car-load lots to the local points above mentioned the second party shall not issue bills of lading beyond Tacoma, and the first party shall have the right to charge thereon its local rate from Tacoma to destination.

6. Agencies.

(*a.*) The second party shall have the exclusive right to appoint agents in Asiatic ports, who shall be duly authorized to act as agents for both parties hereto and who shall have power to issue bills of lading and passenger tickets and to make and name rates on all traffic to points in the United States, Canada and Europe, subject to clauses two and five (2 and 5).

(*b.*) The second party shall have the right, should it be deemed advisable or necessary to appoint, at its own expense, agents in Tacoma, Wash., and or Portland, Ore., and or Victoria, B. C., for the management of the steamships at the ports of call and to procure

traffic from the Pacific coast and for the purpose of assisting and advising the first party in all matters pertaining to the steamship service.

(*c.*) The second party shall have the right, should it be deemed advisable or necessary, to appoint an agent, at its own expense, in New York, United States of America, whose duty shall be to assist in procuring traffic for the steamships of the second party and who shall be under the control of the first party as regards rates.

(*d.*) The first party shall have the exclusive right, with the exceptions above (paragraphs "B" and "C") to appoint agents in all
46 points in the United States, Canada and Europe, and the second party hereby authorizes the first party and its appointed agents to act as agents for the second party and to issue bills of lading and passenger tickets and to make and name rates on all traffic for the Asiatic points served by the steamships of the second party, subject to clause two (2).

7. Commission to agents as remuneration for procuring traffic.

The first party shall pay the agents of the second party a commission of (5) per cent. on its earnings on all Asiatic traffic procured by them; and the second party shall pay the first party for its agents a commission of five (5) per cent. on its earnings on all traffic for Asiatic ports obtained by the agents of the first party.

8. Tallying of cargo.

(*a.*) On arrival of the steamships at Tacoma the cargo shall be carefully tallied out by the officers of the steamships in conjunction with the officials of the first party, all damaged packages shall be set aside and a full and correct list thereof made, and for claims on such damaged packages the second party shall and hereby agrees to be responsible.

The first party shall give the steamship a receipt for all cargoes received at Tacoma, and as regards cargo to be carried over the lines of the first party, the responsibility of the second party shall cease on correct delivery at Tacoma.

(*b.*) On cargo destined for Asiatic ports and delivered to the steamships at Tacoma, a careful tally shall be kept by the officers of the steamship in conjunction with the officials of the first party. All damaged packages shall be set aside and a full and correct list thereof made, and for claims on such damaged packages the first party shall and hereby agrees to be responsible. The steamship officers shall give a receipt for all cargo taken on
47 board at Tacoma, which shall absolve the first party from all further responsibility.

9. Quick dispatch of vessels, coals, etc.—Return cargoes.

The first party agrees to do all it can to assist the second party in obtaining quick dispatch in discharging and loading its steamships at Tacoma; to assist in making contracts for coal, provisions, and labor required by its vessels. And to authorize and permit the agents everywhere (saving as specified in clause 6, paragraphs "B" and "C") to actively solicit all and any traffic that may be required for the return voyages of the steamships to Japan and China.

10. Wharfage.

(a.) First party agrees to provide wharfage at Tacoma free of expense to the second party on all traffic passing over the railroads of the first party.

(b.) On cargo to or from Tacoma locally and Asiatic points, the first party may make a charge to the shippers or consignees of twenty-five (25) cents per ton per steamship's freight list.

11. Cost of advertising, telegraphing, stationery.

The cost of stationery (printing forms, etc.) and of advertising and telegraphing in and from China and Japan shall be at the expense of the second party, and the cost for like services in and from the United States shall be borne by the first party, provided such advertising and telegraphing is done with its consent.

12. Accounts.

(a.) The first party shall render to the agent of the second party at Tacoma within two weeks of the departure of the steamship from Tacoma, or sooner if possible, an account showing the earnings of the steamship inwards and outwards on that voyage, and the balance shall be paid at once by the party owing. Each round
48 trip (inwards and outwards) shall be kept separate. Accounts for the passenger traffic shall be settled through the general office at St. Paul as promptly as possible.

(b.) An account for commission due to the agents of the parties hereto under clause 7, shall be made by the first party as promptly as practicable after the steamer's departure from Tacoma and the same shall be paid at once by the party owing.

(c.) All accounts shall be rendered in triplicate.

13. Sailing ships.

Commencing from the first of January, 1893, it is understood and agreed between the parties hereto that sailing ships shall not be put on berth in China or Japan on behalf of the first party, except in the event of the break-down of the steamships of the second party, or of special circumstances which may render the use of sailing ships necessary to the preservation of the interests of all parties hereto; in which event the placing of sailing ships on the berth shall be first mutually agreed on between the two parties hereto.

14. Alliance with other lines.

During the period of this agreement the second party shall not enter into an alliance with any other trans-continental railway company, and the first party shall not form an alliance with any other Asiatic steamship line to or from Tacoma, except that the second party may, to prevent the establishment of another competing line arrange to run a line of steamers in connection with the Union Pacific Railway Company, to and from Portland, Oregon, with the understanding and agreement that such line, if established, shall be on no better terms as to railway divisions or rates and that the service rendered by the steamers shall be no better or the sailings more frequent, and that the sailing dates shall be so arranged as not to interfere with the Tacoma line.

15. Detention of ships.

49 Unavoidable delay arising from breakdown or loss of the steamships or from excessive bad weather shall not be deemed a breach of this contract.

16. Transfer of contract.

Either party shall have authority to transfer this contract to another responsible firm or company with the consent of the other party.

17. Duration of agreement.

(*a.*) This agreement shall be binding on both parties for the term of ten (10) years from the date hereof, but the second party shall have the option of withdrawing its steamships and of terminating this agreement at the end of the second year, or at the end of each succeeding second year of the above period, provided the second party gives to the first party one year's notice, in writing, of its intention to withdraw its steamships and to terminate this agreement.

(*b.*) The first party may call for arbitration to determine its right to cancel contract upon giving one year's notice of its desire to do so provided the line is not kept up to the standard that will permit of its being fairly worked in competition with other trans-Pacific lines.

18. Interstate commerce law.

Nothing in this agreement shall be permitted to conflict with the provisions of the interstate commerce act, a law passed by the Government of the United States. It is therefore agreed and understood that this agreement shall be at all times subservient to the requirements of that law and shall be modified arbitrarily to conform to its provisions should it become necessary to do so.

19. Settlement by arbitration.

Any disputes arising out of the terms of this agreement shall be settled by arbitration. One arbitrator to be selected by each party and the two so selected to choose a third, the decision of the majority of the arbitrators to be final and conclusive by the parties hereto.

In witness whereof these presents have been executed by the parties hereto:

NORTHERN PACIFIC RAILROAD CO.,
By J. M. HANNAFORD,
General Traffic Manager.

Witness:
JOS. H. BOLTON,
St. Paul, Minnesota.

THE NORTHERN PACIFIC STEAMSHIP CO.,
By R. BARNWELL, *Manager.*

Witness:
GEO. HOLMAN,
6 *Great Winchester Street, London, Solicitor.*
J. L. WILSON,
113 *Cannon Street, London, Gentleman.*

NORTHERN PACIFIC RAILROAD COMPANY,
By T. F. OAKES, *President.*

Attest:
[SEAL.] GEO. H. EARL, *Secretary.*

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To all to whom these presents shall come:

I, John William Peter Jauralde, of the city of London, notary public duly admitted and sworn, do hereby certify that the annexed agreement was signed at the city of London aforesaid on this nineteenth day of May, one thousand eight hundred and ninety-two, by Richard Barnwell as manager of the Northern Pacific Steamship Company, party of the second part therein named, before me the said notary, and in the presence of George Holman and James Lupton Wilson, both of this city, witnesses thereunto subscribing.

In faith and testimony whereof I have hereunto set my hand and seal of office at London, this nineteenth day of May, one thousand eight hundred and ninety-two.

[SEAL.] J. W. P. JAURALDE, *Not. Pub.*

Endorsed: Filed September 16, 1893. Edw. Kurtz, clerk. U. S. circuit court, Filed April 17, 1901. John A. Shields, clerk.

(Here follow bills of lading marked pages 51 and 52.)

53 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the borough of Manhattan, in the city of New York, on Monday, the 16th day of December, in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Hoyt H. Wheeler, judge.

THE FARMERS' LOAN AND TRUST COMPANY
vs.
NORTHERN PACIFIC RAILROAD COMPANY in the Matter of Intervention of the American Trading Company.

This cause coming on to be heard, Frederic B. Jennings, Esq., is heard on behalf of the intervenor; Edward B. Hill, Esq., is heard on behalf of the Northern Pacific Railroad Company; Howard Van Sinderin, Esq., is heard on behalf of the intervenor in reply.

C. A. V.

54 United States Circuit Court, Southern District of New York.

FARMERS' LOAN AND TRUST COMPANY
vs.
NORTHERN PACIFIC RAILROAD COMPANY; Intervention of American Trading Company. } In Equity.

The Northern Pacific Railroad Company had a contract with the Northern Pacific Steamship Company for interchange of traffic between points in the United States and Asiatic ports, by the terms of which the railroad company had the exclusive right to appoint agents in the United States, and the steamship company thereby authorized the railroad company "and its appointed agents to act as

agents for" it, "and to issue bills of lading and passenger tickets and to make and name rates on all traffic for the Asiatic points served by the steamships." The receivers of the railroad company, authorized by the court to carry on its business, continued to act under this arrangement and had an agent at New York. In September, 1894, during the war between China and Japan, the intervenor, the trading company, obtained of him rates which it accepted for carrying 200 tons of pig lead from Newark, N. J., by steamship from Tacoma, sailing October 30 to Yokohama, Japan. The freight was paid to the receivers, a bill of lading, "subject to delay,"
55 was delivered to the trading company and received without objection and negotiated, and the lead was forwarded to Tacoma and seasonably put on board the steamship to sail for Yokohama October 30th. The deputy collector refused to clear the vessel with the lead on board as contraband of war, and it was unloaded and left. The next vessel refused to take it, and when it arrived at Yokohama it had fallen $26,704.02 from the contract price, at which it was to be received from the steamship sailing October 30th. This petition is brought to charge those who have by sale under decree received the property from, and subject to the obligations of, the receivers with this loss.

It is obvious from this brief statement that the delay and consequent loss arose from the official act of the deputy collector lawfully authorized whether well founded or not, with reference to the nature and uses of this very property, and not from anything done or omitted by or for the receivers. The granting of the clearance was within the jurisdiction and authority of the collector and the departure without one was prohibited by law, and would have exposed the master of the vessel to a penalty (Rev. Stat., sec. 4197). The refusal, although not well founded, was not within the control or responsibility of the receivers, as it did not relate to anything with which they had to do, but only to the nature of this shipment. The case in this respect is like New York, N. H. & H. Railroad Co. vs. Baker, 98 Fed., 694, where a passenger was injured on the tracks of another road on the line of the plaintiff in error by the negligence of those engaged under a law of the State in changing tracks; and it was held, reviewing the cases where carriers had been holden for what occurred on the lines of others, that the law excused the plaintiff in error for what was being done, although negligently, under it. The circuit court of appeals said: Lacombe, *J.*: "It will be observed that through all these cases there was an element of
56 choice—the power to act or to refrain from acting." And after asking if the other company would have been liable if the plaintiff had been one of its passengers, answered, "We think not. That road had no choice left to it." Here the steamship, if the receivers were responsible for its movements, had no choice left to it but to leave the lead. That was detained by the superior power of the Government.

It is said that it belonged to the receivers to provide for the clearance of the vessel, which might be true as to anything else; but it

would seem that the shipper could not complain of the carrier for the want of a clearance which the nature of the shipment prevented.

The trading company claims that earlier notice of the situation should have been given but there is nothing to show that it would have saved, or have given opportunity to save any part of the loss, or that an earlier shipment would. This view obviates examination as to whether the receivers were liable beyond delivery to the steamship company.

Petition of intervention dismissed.

HOYT H. WHEELER, *Judge.*

Frederick B. Jennings, Howard Van Sinderen, for petitioner.
Edward B. Hill, for petitionee.

(Endorsed): Circuit court of the United States, southern district of New York.—Farmers' Loan and Trust Co. vs. Northern Pacific R.R.Co.—Intervention of American Trading Co.—Opinion, Wheeler, J.—U. S. circuit court southern district of New York.—Filed Jan. 18, 1902.—John A. Shields, clerk.

57 Circuit Court of the United States, Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY *against* NORTHERN PACIFIC RAILROAD COMPANY ET AL.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

This cause upon the intervention of the American Trading Company came on to be heard at this term, and was argued by counsel for the intervener and for the Northern Pacific Railway Company; and, thereupon, on consideration thereof, it is

Ordered, adjudged and decreed that the intervening petition of the American Trading Company herein be, and the same is hereby dismissed; and it is further ordered, adjudged and decreed that the Northern Pacific Railway Company have and recover against the American Trading Company the sum of fifty-five dollars and thirty-five cents costs and disbursements as taxed, and have execution therefor.

HOYT H. WHEELER,
U. S. Judge.

(Endorsed:) United States circuit court, southern district of New York.—The Farmers' Loan and Trust Co. vs. Northern Pacific R. R. Co. *et al.*, in the matter of the intervention of the American
58 Trading Company.—Decree and notice of settlement.—Howard Van Sinderen, solicitor for American Trading Company, 35 Wall street, New York city.—Due service of a copy of the within is hereby admitted.—Dated 24th day of Jan., 1902.—Sullivan & Cromwell, atty's for def't.—U. S. circuit court.—Filed Jan. 30, 1902.—Southern district of New York.—John A. Shields, clerk.

Circuit Court of the United States, Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
against
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

To the honorable the judges of the circuit court of the United States for the southern district of New York:

The American Trading Company, the intervenor, complainant, conceiving itself aggrieved by the final decree made herein and filed in the office of the clerk of the circuit court of the United States for the southern district of New York on or about the 31st day of January, 1902, whereby it was adjudged that the petition of intervention be dismissed and that the Northern Pacific Railway Com-
59 pany recover against the American Trading Company the sum of fifty-five dollars and thirty-five cents, costs and disbursements, hereby appeals from said decree to the United States circuit court of appeals for the second circuit, for the reasons specified in the assignment of errors, which is herewith filed, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the second circuit.

Dated New York, January 31, 1902.

HOWARD VAN SINDEREN,
Solicitor for the American Trading Company.

The foregoing appeal is hereby allowed.
Dated February 5, 1902.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York.—The Farmers' Loan & Trust Co. against Northern Pacific R. R. Co. *et al.*—In the matter of the intervention of American T. Co.—Petition for leave to appeal and order thereon.—Howard Van Sinderen, solicitor for Am. T. Co., 35 Wall St., New York city.—Due service of a copy of the within is hereby admitted. Dated 6th day of Feb'y, 1902.—Sullivan & Cromwell, atty's for N. P. R. R. Co.—U. S. circuit court, southern district of New York.—Filed Feb. 6, 1902.—John A. Shields, clerk.

60 Circuit Court of the United States, Southern District of New York.

THE FARMERS' LOAN AND TRUST COMPANY
against
NORTHERN PACIFIC RAILROAD COMPANY ET AL.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

Comes now The American Trading Company, the intervenor, complainant, by Howard Van Sinderen, its solicitor, and files the following assignments of error in this cause:

First. The court erred in finding and deciding that the delay in the transportation to and delivery at Yokohama, Japan, of the pig lead referred to in the case, and the consequent loss to the American Trading Company, arose from the official act of the deputy collector of the United States at the port of Tacoma lawfully authorized, with reference to the nature and uses of this very property.

Second. The court erred in finding and deciding that the delay or consequent loss did not arise from anything done or omitted by or for the receivers.

Third. The court erred in finding and deciding that the refusal of the deputy collector to clear the ship with the lead on board was not within the control and responsibility of the receivers, and
61 that it did not relate to anything with which they had to do, but only to the nature of the shipment.

Fourth. The court erred in finding and deciding that the steamship, if the receivers were responsible for its movements, had no choice left to it but to it leave the lead.

Fifth. The court erred in finding and deciding that the want of clearance was due to the nature of the shipment.

Sixth. The court erred in finding and deciding that there is nothing to show that earlier notice to the American Trading Company, of the delay at Tacoma, would have saved, or have given opportunity to save, any part of the loss, or that an earlier shipment would.

Seventh. The court erred in dismissing the petition of intervention.

Eighth. The court erred in not finding and deciding that the contract under which the lead was shipped, imposed upon the receivers the obligation to deliver the lead at Yokohama, Japan, as provided therein.

Ninth. The court erred in not finding and deciding that time was of the essence of the contract.

Tenth. The court erred in not finding and deciding that the delay in transportation and the consequent loss to the American Trading Company were due to the negligence of the receivers.

Eleventh. The court erred in not finding and deciding that the claim of the American Trading Company, amounting to $26,704.02 and interest, should be paid by the Northern Pacific Railway
62 Company, and that in default thereof, the same should be enforced pursuant to the final decree of foreclosure in the

consolidated cause, and in not granting a decree in accordance with the prayer of the petition.

Wherefore, The American Trading Company, intervener, complainant, prays for a reversal of the decree entered in the office of the clerk of the circuit court of the United States for the southern district of New York, on or about January 31, 1902, and for a direction for the entry of a decree in accordance with the prayer of its petition of intervention, and for such other relief as may be equitable.

Dated New York, January 31, 1902.

HOWARD VAN SINDEREN,
Solicitor for the American Trading Company,
35 *Wall Street, New York.*

(Endorsed:) United States circuit court, southern district of New York.—The Farmers' Loan & Trust Co. against Northern Pacific R. R. Co. *et al.*—In the matter of the intervention of the American Trading Company.—Assignments of error.—Howard Van Sinderen, solicitor for Am. T. Co., 35 Wall street, New York city.—U. S. circuit court, southern district of New York.—Filed Feb. 5, 1902.—John A. Shields, clerk.

Know all men by these presents, that we, the American Trading Company, a corporation organized under the laws of the State of Connecticut, as principal, and the American Bonding and Trust Company of Baltimore City, a corporation duly organized under the laws of the State of Maryland, having an office at 253 Broadway, borough of Manhattan, city and State of New York, as surety, are held and firmly bound unto the Northern Pacific Rail-
63 way Company in the sum of two hundred and fifty ($250) dollars, to be paid to the said Northern Pacific Railway Company, its successors and assigns, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 4th day of February, 1902.

Whereas, the American Trading Company has appealed to the circuit court of appeals of the United States for the second circuit from a final decree entered in the office of the clerk of the circuit court of the United States for the southern district of New York, on or about January 31, 1902, dismissing the petition of intervention of the American Trading Company in the suit wherein The Farmers' Loan and Trust Company is complainant and The Northern Pacific Railroad Company and others are defendants, and for the sum of fifty-five and $\frac{35}{100}$ ($55.35) dollars costs.

Now, therefore, the condition of this obligation is such that if the above named The American Trading Company shall prosecute its said appeal to effect, and answer all damages and costs if it shall

fail to make its plea good, then this obligation to be void, otherwise to remain in full force and virtue.

THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY, [SEAL.]
By HOWARD ABRAHAMS, *Vice-President.*

Signed and sealed in presence of
P. A. NOLAN.

Attest: HENRY J. SAGE,
Assistant Secretary.

THE AMERICAN TRADING CO.
WM. H. STEVENS, *Treas.* [SEAL.]

64 STATE OF NEW YORK, } *ss:*
City and County of New York, }

On the 4th day of February, 1902, before me personally came Howard Abrahams, to me known, who being by me duly sworn, did depose and say: That he resided in the city of New York; that he is the vice-president of the American Bonding and Trust Company of Baltimore City, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of New York, for the Year 1893. And the said Howard Abrahams further said that he was acquainted with Henry J. Sage, and he knew him to be the assistant secretary of said company; that the signature of said Henry J. Sage subscribed to the within instrument is the genuine handwriting of the said Henry J. Sage, and was subscribed thereto by like order of the board of directors, in the presence of him the said Howard Abrahams.

[SEAL.] PHILIP H. FETT,
Notary Public (*No.* 34), *Kings Co.*

Certificate filed in New York Co.

65 *Statement of the American Bonding and Trust Company of Baltimore City at the Close of Business, December* 31*st*, 1901.

Financial statement.

Capital paid in	$1,000,000 00
Stockholders' liability	1,000,000 00
Reserve for reinsurance	260,657 82
Surplus and undivided profits	325,300 15
Total	$2,585,957 97

Assets.

Par value.		Market value.
55,500.	—Baltimore City stock (bonds), 3½ per cent., 1945	$62,715 00
357,000.	—Baltimore City stock (bonds), 3½ per cent., 1940	401,625 00
20,400.	—Baltimore City stock (bonds), 3½ per cent., 1930	22,542 00
58,000.	—Baltimore City stock (bonds), 3½ per cent., 1928	64,090 00
14,800.	—Baltimore City stock (bonds), 6 per cent., 1902	14,800 00
6,000.	—Baltimore City stock (bonds), 4 per cent., 1920	6,780 00
3,000.	—Baltimore City stock (bonds), 4 per cent., 1925	3,510 00
6,600.	—Baltimore City stock (bonds), 5 per cent., 1916	8,052 00
85,000.	—United R'y & Electric Co. of Baltimore City, 4 per cent. gold bonds, 1949	80,750 00
10,000.	—Baltimore & Ohio S. W. bonds, 3½ per cent., 1925	9,150 00
50,000.	—City of Mobile, Ala., bonds, 4½ per cent., 1939.	54,000 00
25,000.	—City of Richmond, Va., bonds, 4 per cent., 1926, 1929	26,750 00
25,000.	—Norfolk county, Va., bonds, 5 per cent., 1907..	26,125 00
10,000.	—City of Norfolk, Va., bonds, 5 per cent., 1912..	10,800 00
2,000.	—City of Manchester, Va., bonds, 5 per cent., 1929	2,140 00
8,500.	—City of Cumberland, Md., bonds, 4 per cent., 1901–1907	8,500 00
18,000.	—City of Snow Hill, Md., bonds, 6 per cent., 1906–1923	18,900 00
25,000.	—State of Georgia bonds, 4½ per cent., 1915	28,625 00

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25,000.	—State of Tennessee bonds, 3 per cent., 1913...	$23,750 00
69,762.44.	—City of New Orleans, 6 per cent. certificates	69,762 44
75,000.	—W. Va. Central and Pittsburg R'y Co., 6 per cent. mtge. bonds	86,625 00
200.	—Shares Continental Trust Co. of Baltimore..	46,000 00
150.	—Shares Merchants' National Bank of Baltimore	29,775 00
	Outstanding premiums, less commissions...	77,127 32
	Accounts receivable, secured	112,597 96
	Interest accrued	25,351 23
	Real estate	27,131 91
	Furniture and fixtures	1 00
	Mortgage loans	111,809 63

Time loans	6,910 00
Call loans	141,110 61
Cash in office and depositories	95,885 31
	$1,703,691 41

Liabilities.

Capital stock		$1,000,000 00
Collateral deposits		51,836 12
Agents' credit balances		4,913 75
Special reserve for reported losses, proofs not filed		60,983 57
Legal reserve	$260,657 82	
Surplus and undivided profits	325,300 15	
		585,957 97
		$1,703,691 41

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Howard Abrahams, being duly sworn, says: That he is the vice-president of the American Bonding and Trust Company of Baltimore City; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31, 1901, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

HOWARD ABRAHAMS.

Subscribed and sworn to before me this 4th day of February, 1902.

PHILIP H. FETT,
[SEAL.] *Notary Public* (*No.* 24), *Kings Co.*

Certificate filed in New York Co.

67 Form 026.

Local Board, Special.

Extracts from Charter of the American Bonding and Trust Company of Baltimore City.

"The said company shall be and is hereby authorized and empowered to insure the fidelity of persons holding places of trust or responsibility to or under any State, county, city, corporation, person or persons whatsoever; to become security for the faithful performance of any trust, office, duty, contract or agreement, and to supersede any judgment to go on any appeal or other bond."

* * * * * * *

"That the directors shall * * * elect from their number * * * an executive committee."

The executive committee so chosen * * * shall have power to elect non-resident local boards, non-resident local vice-presidents and non resident local assistant secretaries * * * with power

to sign and deliver bonds of suretyship and other obligations for and on behalf of and in the name of said company to the same effect and with the same binding obligations as if the said instruments had been executed by the president or vice-president and secretary or assistant secretary. * * *"

* * * * * * *

Extract from minutes of a meeting of the executive committee held at the office of the company at Baltimore, Maryland, on the 4th day of November, 1901.

Mr. Ernest Hoen, Jr., presented the following resolution, seconded by Mr. James S. Woodside:

"Preamble.—Whereas, in virtue of certain resolutions dated the "8th day of August, 1899, William P. Flanders and James G. Brown "were declared appointed or elected vice-presidents, and Henry J.
"Sage, Hulbert T. E. Beardsley, Edward B. Southworth, Jr.,
68 "and Philip H. Fett were declared appointed or elected assist-
"ant secretaries to serve in the city of New York, State of New "York; now, therefore,

"*Resolved*, That said appointment or election of said persons, for "reason, is hereby declared null and void, and all powers granted "under said resolution are hereby revoked; to more definitely de- "termine the purpose and intention of said annul*l*ment and revoca- "tion, be it further

"*Resolved*, That Howard Abrahams, of New York city, New York, "and Henry J. Sage, of the same place, be and are hereby appointed "resident vice-president and assistant secretary, respectively, of this "company at New York city, New York, with power to execute "bonds on behalf of the company for its business and in accordance "with its charter. That in the absence of the said Howard Abra- "hams, William P. Flanders, of the same place, be, and he is hereby "authorized to act as resident vice-president with the same power as "the said Howard Abrahams; and that in the absence of the said "Henry J. Sage, either Hulbert T. E. Beardsley or Edward B. South- "worth, Jr., of the same place, be and are hereby authorized to sign "all bonds and undertakings issued by the company as assistant sec- "retary, in attestation of the seal of the company affixed thereto.

"The question being put, all the members present voted in the "affirmative, the motion was declared adopted."

I, Samuel H. Shriver, secretary of the American Bonding and Trust Company of Baltimore City, hereby certify that the foregoing are true and correct copies taken from the records of the American Bonding and Trust Company of Baltimore City.

In witness whereof, I have hereunto subscribed my name and affixed the corporate seal of the American Bonding and Trust Company of Baltimore City, at Baltimore, Maryland, this 6th day of November, 1901.

[SEAL.] SAMUEL H. SHRIVER, *Secretary.*

69 (Endorsed:) Circuit court of the United States, southern district of New York.—The Farmers' Loan and Trust Company against Northern Pacific Railroad Company.—In the matter of the intervention of the American Trading Company.—Bond on appeal.—Howard Van Sinderen, 35 Wall street, N. Y., att'y.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the appellee of the right at any time to examine the proper officers of the surety company under oath, touching their assets, liabilities and financial condition generally. E. H. Lacombe, U. S. circuit judge.—U. S. circuit court, southern district of New York.—Filed Feb. 5, 1902.—John A. Shields, clerk.

By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To the Northern Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear before a United States circuit court of appeals for the second circuit, to be holden at the borough of Manhattan in the city of New York, in the district and circuit above named, on the 4th day of March, 1902, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The American Trading Company, intervenor, is appellant, and you are appellee, to show cause, if any there be, why the decree in said cause mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 5th day of February, in the year of our Lord one thousand nine hun-
70 dred and two, and of the Independence of these United States the one hundred and twenty-sixth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States circuit court of appeals for the second circuit.—The American Trading Company, intervenor, appellant, *vs.* Northern Pacific Railway Company, appellee.—Original citation.—Due service of a copy of the within is hereby admitted. Dated 6th day of Feb'y, 1902. Sullivan & Cromwell, att'ys for N. P. R. R. Co.—U.S. circuit court, southern district, New York.—Filed Feb. 6, 1902.—John A. Shields, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to seventy inclusive, contain a true and complete transcript

of the record and proceedings had in said court, in the cause entitled The Farmers' Loan and Trust Company against Northern Pacific Railroad *et al.*, appellee-, in the matter of the intervention of The American Trading Company, appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 19th day of February, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

71 United States Circuit Court of Appeals for the Second Circuit, October Term, 1902.

Submitted December 4, 1902; decided January 15, 1903.

THE FARMERS' LOAN AND TRUST Company, Complainant, Appellee,

vs.

THE NORTHERN PACIFIC Railroad Company *et al.*, Defendants, Appellees; The American Trading Company, Intervenor, Appellant.

No. 30. Appeal from the Circuit Court of the United States for the Southern District of New York. Before Judges Wallace, Lacombe, and Townsend.

TOWNSEND, *Circuit Judge:*

This is an appeal from a decree of the United States circuit court for the southern district of New York, dismissing the petition of the American Trading Company for the recovery of its claim against the receivers of the Northern Pacific Railroad Company. The decree under which the property of said corporation was sold provided that such sale should be subject to all obligations or liabilities contracted or incurred by said receivers, and that such claims might be enforced by such a petition in this court.

The case was tried to the court without a jury upon an agreed statement of facts from which, *inter alia*, it appeared that at the time of the transactions in question the receivers of the Northern Pacific Railroad Company were carrying on the business of said road under authority of said court; that the road in their possession ex-
72 tended from Duluth, Minnesota, to Tacoma, Washington; that under contracts with carriers they issued through bills of lading to and from points outside of their line, and that among such carriers was the Northern Pacific Steamship Company, an English company operating a line of steamers between Tacoma and points in Japan, including Yokohama; that the freight business of said railroad company over its railroad and outside connections in the eastern part of the United States was in charge of one George R. Fitch, the general eastern agent of the receivers, at their office in the

city of New York; that his only authority to act as agent of said steamship company was under a contract between the railroad company and the steamship company, but that he had been instructed by said receivers to solicit freight and issue such bills of lading as the one herein involved, providing for through transportation by said railroad company and steamship company, and that he had no express general authority to make such contracts except as provided in said bills of lading, and no express authority to make the contract herein unless by virtue of certain telegrams to be hereinafter set forth; and that the petitioner herein did not know that the steamship company was a separate and independent company.

The material part of the agreed statement as to the transaction in question is as follows:

"5. In September, 1894, the trading company applied to Fitch for a rate upon a proposed shipment of pig lead from New York to Yokohama, Japan, and informed him that it was of vital importance that the lead should be transported promptly and go forward by the earliest possible steamer without delay, in order to enable the trading company to fulfil a proposed agreement which it was about to make for the sale of the lead in Japan, and which would require its delivery there at a fixed date. Fitch thereupon named a rate, and undertook to forward the lead from New York on or before September 29th, and via the Northern Pacific steamer *Tacoma* sailing from Tacoma October 30, 1894."

73 The petitioner thereupon accepted Fitch's proposition, purchased said lead in bond and closed said proposed agreement for the sale of said lead.

Fitch subsequently wrote the petitioner confirming contract for shipment "to be forwarded from New York on or before September 29th, in accordance with shipping instructions given you by me, and to be forwarded from Tacoma, Wash., via Northern Pacific steamer sailing from thence October 30th," which the petitioner accepted in a letter repeating the aforesaid terms, and it arranged for shipment in accordance with Fitch's request to "see that same are rushed through without delay to connect with our steamer at Tacoma."

On September 24, 1894, Fitch informed the trading company that he declined to ship the lead upon the ground that it might be contraband of war, and thereupon on the same day the trading company wrote him a letter stating that they would hold his company responsible for any loss from failure to fulfill the contract.

Thereupon Fitch notified the general freight agent of the receivers and received the following telegram in reply:

"SEPTEMBER 25, 1894.

"G. R. Fitch, 319 Broadway, New York:

"Your wire this date to Mr. Hannaford: Dodwell, Carlill & Co. have consented to accept the lead already contracted. Do not contract for any more. Advise quick number of pounds contracted by

you and say how it will be routed. Think we should receipt for lead subject to delay.

0–900 J. B. BAIRD. WDB."

Dodwell, Carlill & Company represented the steamship company. Thereupon the refusal was withdrawn and the shipment was made under said contract, the lead being in course of transportation
74 on the afternoon of September 27th, and reached Tacoma in time for shipment as agreed on the steamer sailing October 30th. On September 28, 1894, petitioner gave Fitch its check for the freight and Fitch subsequently delivered a bill of lading in the usual printed form, but upon which were stamped the words "subject to delay," to a clerk of the petitioner, who received it without any stated objection to its terms, and it was not read or examined by him or by any officer of the company, and was immediately hypothecated for moneys borrowed thereon. Said cheque was payable to the order of the Northern Pacific railroad, was endorsed by Fitch as general eastern agent, and the proceeds were remitted to said receivers and were divided and distributed under said contract with the steamship company.

On September 29th, Fitch sent a copy of said bill of lading to the agent of said steamship company with the following letter:

"SEPTEMBER 29, 1894.

"Dodwell, Carlill & Co., Tacoma, Wash.

"GENTLEMEN: I hand you herewith my B–L 1507 covering shipment of pig lead for export to Amer. Trading Co., Yokohama, Japan. As I have previously advised you, I have made contract guaranteeing delivery of this shipment at Yokohama by our S. S. *Tacoma* sailing October 30th. Will you kindly see that this connection is made, without fail.

Yours truly,

(S'g'd) GEO. R. FITCH, *G. E. A.*"

At Tacoma the lead was delivered by the receivers to the Northern Pacific Steamship Company and was loaded upon the *Tacoma*, the vessel of the steamship company which was to sail on October 30th; but about four o'clock in the afternoon of that day, the deputy collector of the port refused to clear the vessel while the lead was on board upon the ground that it was contraband of war, and telegraphed to the collector of Port Townsend for instructions.
75 On the following day the deputy collector at Tacoma received a telegram for the collector at Port Townsend advising that the shipment be permitted.

In the meantime the master of the vessel had unloaded the lead, which delayed the ship until 9 a. m. on the morning of October 31st, when he sailed without it.

The petitioner was not notified of the delay in the transshipment of the lead until November 5th, 1894.

The lead went forward on a later vessel, but in consequence of the delay the purchaser refused to receive the shipment and in conse-

quence the petitioner was obliged to sell it in the open market and thereby suffered a loss of $26,704.02.

The petitioner contends that the original contract for through transportation was within the scope of Fitch's authority as general eastern agent of the receivers, and was within the scope of the general powers of the receivers under the order of court; that it was adopted and ratified by the receivers; and that the failure to perform was due to their negligence and was not excused by the refusal of the deputy collector to clear the ship.

Counsel for the receivers contend that there was no agreement that the receivers should assume responsibility except over their line of railway; that the receivers had no power to make such a contract; that if Fitch made any such contract it was for the steamship company and not for the receivers; that he had no authority to make any contract on behalf of the receivers for the carriage of goods beyond Tacoma; that the original agreement was merged in the bill of lading; that failure to perform was excused by impossibility of performance.

The receivers, under the order of court, were authorized to continue the business of the railroad system of said company; that is, to conduct the business of a common carrier. And receivers acting within the scope of their authority are clothed with substantially the same powers and are subject to substantially the same liabilities as such receivers as those applicable to the corporation. *Farlow v. Kelly* (108 *U. S.*, 288); *Beers v. Wabash, St. L. & P. R'y. Co* (34 *Fed.*, 243, 247); *Elliott on Railroads* (*sections* 567, 576), and cases
76 cited; *Hutchinson on Carriers* (*section* 67); *Beach on Receivers* (*section* 371); *Central Trust Co. v. N. Y. C. & H. R. R. R.* (110 *N. Y.*, 250, 257); *Little, Rec'r v. Dusenberry, Adm.* (46 *N. J. Law Reps.*, 614); *Wall v. Platt* (169 *Mass.*, 398, 400.) A carrier may contract for transportation beyond its own route and assume liability for the entire distance over connecting lines to the same extent as over its own line. *R. R. v. Pratt* (22 *Wall.*, 123); *R. R. v. McCarthy* (96 *U. S.*, 258). No reason is apparent why receivers have not the same power, and the authorities so far as cited are to that effect. *Kansas Pacific R'y Co. v. Bayles* (19 *Colo.*, 358; 35 *Pac. Rep.* 744; *Elliott on Railroads, supra*).

Under the order of court authorizing them to conduct the business of common carriers, it was their right to so manage the property as would in their judgment secure the best results consistently with the proper discharge of their duties. Under this authority they could and did issue through bills of lading beyond their route and by the steamers of the steamship company.

In *Myrick v. Michigan Central R. R. Co.* (107 *U. S.*, 102), the court says:

"Any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

If Fitch had authority to make the agreement undertaken by him, its terms are sufficiently clear and certain to meet this rule.

Fitch was the general eastern freight agent of the receivers. It has been held that it is within the power of a general freight agent to contract for the carrying of goods beyond the limit of the carrier's line: *White v. M. P. R. Co.* (19 *Md. App.*, 400); *Grover & Baker Sewing Machine Co. v. Mo. Pacific R. R. Co.*, (70 *Mo.*, 672); and to stipulate for forwarding goods by a certain vessel and for
77 carrying within a specified time. *Goddard v. Mallory* (52 *Barb.*, 87, 95); *Goodrich v. Thompson* (44 *N. Y.*, 324); *Strohn v. Detroit, &c., R. R.* (23 *Wis.*, 126).

It is elemental that as to third parties dealing with such a general agent, thus representing a corporation in the management of its business, and acting within the scope of his apparent authority, the principal is bound to the same extent as though it had directly conducted the business itself. *Isaacson v. N. Y. C. & H. R. R. Co.* (94 *N. Y.* 278); *Pechner v. Phœnix Insurance Co.* (65 *N. Y.*, 195).

And so far as appeared from said course of dealing and from said bills and so far as this petitioner knew or had reason to know said steamers were owned and operated by said receivers.

In any event the receivers having first expressly authorized Fitch to accept a certain rate for this shipment to Yokohama and having afterwards attempted to cancel said quotation, upon notice of the petitioner's refusal to ship and of their claim under a written contract already given, without any further enquiry as to the terms of said contract except as to the number of pounds and route, authorized Fitch to accept the lead already contracted, and suggested to Fitch, but did not instruct him, that the receipt for lead should be subject to delay. That the receivers knew that the contract provided for shipment per steamship *Tacoma* on October 30th, may perhaps be inferred from their telegram to Fitch on September 25th, asking for such information. Thus having all the knowledge of the facts which they desired, they authorized the shipment and under said authority the "shipment was made under the contract," in bond.

It sufficiently appears that the contract was made by Fitch on behalf of and was ratified by the receivers, and that it provided for shipping the goods by steamer sailing October 30th.

But counsel for the receivers claims that said written contract was merged in the bill of lading.

78 That the mere receipt of a bill of lading does not affect or alter a prior contract under which goods have been actually shipped and are in course of transit without actual consent to such a change is well settled. *Missouri Pacific Railway Co. v. Barnes* (30 *Kansas*, 298; *Swift v. Pacific Mail Steamship Co.* (106 *N. Y.*, 206; *Railroad Co. v. Manufacturing Co.* (16 *Wall.*, 318); *Gains v. Union Trans. Ins. Co.* (28 *Ohio St.*, 418).

In *Bostwick v. B. & O. &c.* (45 *N. Y.*, 712), goods were shipped under the same conditions as herein shown, namely, a through freight contract by an agent, beyond the route of the defendant railroad, and with a later receipt of bills of lading. A loss having occurred,

defendant claimed exemption under the conditions of bill of lading. But the court said:

"The rule that prior negotiations are merged in a subsequent written contract does not apply to such a case as this."

Before the issuance of the bill of lading the petitioner, relying upon said prior contract, had made its engagement to deliver at Yokohama at a fixed date, had bought the load, paid the through freight, and had surrendered possession and control of it. The shipment was made in bond for exportation at Tacoma, and was secured upon the cars by Government locks and "customs seals." Receivers could not oblige it to consent to a change in its contract.

But counsel for the receivers contends that the subsequent negotiation by petitioner of said bill conclusively shows that the petitioner adopted it and assented to all of its terms. In support of this proposition he cites *Rubens v. Ludgate Hill Steamship Company* (2 *N. Y. Supp.*, 481); and *The Henry B. Hyde* (82 *Fed.*, 681). But in neither of said cases was there any agreement with the shipper prior to the receipt of the bill of lading. In the *Henry B. Hyde* the court expressly says that it is the acceptance of the bill of lading "at the time of the delivery of his goods for shipment" which binds the shipper.

79 The decisive answer to this contention of counsel for receivers is that such acquiescence in or adoption of said bill of lading by petitioner only affects its rights and obligations toward the parties with whom said bill was negotiated. As to them the petitioner is estopped to deny the conditions of the bill upon the familiar principle that one who has thus negotiated such an instrument thereby ratifies its terms and conditions. But we know of no rule by which such ratification can be extended to or taken advantage of by a carrier, in order to annul a prior valid contract under which rights have vested and obligations have accrued. This can only be done by the consent of both parties. As to the carrier the transaction is *res inter alios acta*.

Counsel for the receivers contend and the court below held that the shipment having become impossible temporarily through the act of the deputy collector, the receivers were not bound to provide for a clearance of the vessel, and that, therefore, they are not liable for the delay.

We cannot assent to this proposition in view of the situation of the parties as shown by the admissions on file.

The traffic agreement between the Northern Pacific Railroad Company and the Northern Pacific Steamship Company shows that said steamship company was expressly organized in order to establish a close alliance with said Northern Pacific Railroad Company to control freight traffic between the United States and Japan; that the steamship company was bound to supply steamships according to the exigencies of Northern Pacific traffic; and that the steamship company and railroad company were to conjointly arrange for the receipt of goods at Tacoma and assumption of liability thereon.

Before this contract was made, Fitch had expressed some doubt as to whether, in view of the existing war between China and Japan,

such shipment would be permitted. After the contract was made he had attempted to withdraw therefrom, but upon being
80 notified that petitioner would hold the receivers liable for resulting damages, they secured from the steamship company a contract to accept the lead, and authorized him to carry out the contract.

In these circumstances it was incumbent upon the receivers to at least show that they used all reasonable means to guard against damage resulting from delay by reason of the very risks foreseen and assumed by them. There is nothing in the stipulated facts to show that they took any precautions or exercised any care in advance other than Fitch's letter of September 29th, to the agent of the steamship company, or that, when the contemplated exigency arose, they made any effort to meet it. They assumed the obligation with knowledge of the risks incident to its discharge and the damages likely to result from delay; they reaffirmed it with knowledge that if they did not choose to assume said risks the petitioner would ship by another route and charge the difference in rates; they failed to guard against the happening of said risks, and it does not appear that, after the actual interference with the shipment from Tacoma, they made any attempt to prevent the unloading of the lead for the brief time necessary to obtain instructions from the collector, or to arrange to have it reloaded in case of a favorable report, or to secure any delay in the sailing of the vessel, and they negligently failed to notify the petitioner of the delay for six days thereafter.

The fact stated in the agreed submission, that "neither Fitch nor the receivers knew until September 24th, that any contract for the sale of lead in Japan had been concluded by the trading company," does not affect the measure of damages, because they arranged for said shipment after their knowledge that such a contract had been made, and their agent was informed, before any contract for shipment was made, that such shipment was contemplated in order to fulfil a proposed agreement, which would require its delivery in Japan at a fixed time.

In these circumstances the measure of damages is the difference between the contract price and the actual market value of
81 the goods at the time of delivery. *New York, Lake Erie & Western Railroad Company v. Estill*, and *v. Leonard* (147 *U. S.*, 591, 616); *Messmore v. New York Shot & Lead Company* (40 *N. Y.*, 422); *Booth v. Spuyten Duyvil Rolling Mill Company* (60 *N. Y.*, 489).

Let an order be entered reversing the decree and directing the payment to the intervenor of $26,704.02, with interest thereon from the 4th day of January, 1895, and costs.

F. B. Jennings, for the appellant.

Edward B. Hill, for the appellee.

82 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the Post Office building in the city of New York, on the 26th day of January one thousand nine hundred and three.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. William K. Townsend, circuit judges.

FARMER'S LOAN & TRUST COMPANY, Complainant-Appellee,
vs.
NORTHERN PACIFIC RAILROAD COMPANY ET AL., Defendants-Appellees; The American Trading Company, Intervenor-Appellant.

Appeal from the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said circuit court be and it hereby is reversed with costs, and with instructions to the circuit court to decree conformably to the opinion of this court.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.

83 [Endorsed:] United States circuit court of appeals, second circuit. Farmer's Loan & Trust Co. *vs.* Northern Pacific R. R. Co. Order for mandate. United States circuit court of appeals, second circuit. Filed Jan. 26, 1903. William Parkin, clerk.

84 U. S. Circuit Court of Appeals, Second Circuit.

THE FARMERS' LOAN & TRUST COMPANY, Complainant,
against
THE NORTHERN PACIFIC RAILROAD COMPANY and Others, Defendants.
} Petition for Appeal.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

The above named appellant, The Northern Pacific Railway Company, by Sullivan & Cromwell, its solicitors, conceiving itself aggrieved by the decree made by the circuit court of appeals in and for the second judicial circuit, entered in the office of the clerk of this court on the 26th day of January, 1903 in the above entitled proceeding, doth hereby appeal from said decree to the Supreme Court of the United States, and prays that its appeal may be allowed, and that a transcript of the record and proceedings upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, March 18, 1903.

SULLIVAN & CROMWELL,
Solicitors for Appellant.

85 U. S. Circuit Court of Appeals, Second Circuit.

THE FARMERS' LOAN & TRUST COMPANY, Complainant,
against
THE NORTHERN PACIFIC RAILROAD COMPANY and Others, Defendants.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

The foregoing appeal of the Northern Pacific Railroad Company is hereby allowed as prayed.
Dated, April 6 1903.

WM. J. WALLACE,
Circuit Judge.

86 [Endorsed:] U. S. circuit court of appeals, second circuit. The Farmers' Loan & Trust Company, complainant, *vs.* The Northern Pacific Railroad Company, and others, defendants. In the matter of the intervention of the American Trading Company. Petition for appeal and allowance. Sullivan & Cromwell, solicitors for appellant, 49 Wall street, New York, N. Y. United States circuit court of appeals, second circuit. Filed April 6, 1903. William Parkin, clerk.

87 United States Circuit Court of Appeals, Second Circuit.

THE FARMERS' LOAN AND TRUST COMPANY, Complainant,
against
NORTHERN PACIFIC RAILROAD COMPANY and Others, Defendants.

In the Matter of the Intervention of THE AMERICAN TRADING COMPANY.

Assignment of Errors.

Now on the 18th day of March, 1903, comes The Northern Pacific Railway Company, appellant, by Sullivan & Cromwell, its solicitors, and says that in the order or decree of the United States circuit court of appeals for the second circuit entered on the 26th day of January, 1903, there is manifest error in the following particulars, to wit:

First. The court erred in deciding that the receivers of the Northern Pacific Railroad Company assumed responsibility for transportation and delivery of petitioner's goods beyond the line of railroad operated by them.

88 *Second.* The court erred in deciding that the receivers had power and authority to contract for transportation beyond the line of railroad operated by them.

Third. The court erred in deciding that Fitch entered into an

engagement or undertaking for or on behalf of the receivers to transport and deliver petitioner's goods beyond Tacoma.

Fourth. The court erred in not deciding that in making any agreement for the carriage of petitioner's goods beyond Tacoma, Fitch acted solely as the agent of the Northern Pacific Steamship Company.

Fifth. The court erred in deciding that Fitch possessed authority, or apparent authority, to contract in behalf of the receivers for transportation and delivery of goods beyond Tacoma.

Sixth. The court erred in deciding that the receivers ratified any contract made by Fitch for transportation and delivery of petitioner's goods beyond Tacoma.

Seventh. The court erred in deciding that the prior negotiations regarding petitioner's shipment were not merged in and superseded by the bill of lading.

89 *Eighth.* The court erred in not deciding that petitioner assented to, accepted, confirmed and adopted the bill of lading as constituting the contract between the parties.

Ninth. The court erred in not deciding that the receivers had fully performed their contract and fulfilled all obligations imposed upon them by due and timely delivery of the petitioner's goods to the Northern Pacific Steamship Company at Tacoma.

Tenth. The court erred in deciding that the act of the deputy collector did not make performance impossible and excuse failure to perform.

Eleventh. The court erred in deciding that it was incumbent on the receivers to show that they used all reasonable means and precaution to guard against damage from delay.

Twelfth. The court erred in deciding that the receivers failed to guard against risks foreseen and assumed by them.

Thirteenth. The court erred in not deciding that the contract of the receivers was *ultra vires* and the liability for damages, if any, a personal liability and not one for which the Northern Pacific Railway Company is bound to respond.

90 *Fourteenth.* The court erred in not deciding that the delay in transportation and delivery of petitioner's goods was caused by the official act of the deputy collector of the United States at Tacoma, and not by anything done or omitted by the receivers.

Fifteenth. The court erred in not deciding that the delay in transportation was due solely to the nature of the shipment.

Sixteenth. The court erred in deciding that the contract under which the petitioner's goods were shipped imposed upon the receivers the obligation to deliver the said goods at Yokohoma, Japan, in due time.

Seventeenth. The court erred in reversing the decree of the United States circuit court and directing payment to the intervenor of $26,704.02 with interest.

Wherefore the appellant prays that the said order or decree of the United States circuit court of appeals be reversed, and that the

decree of the United States circuit court may be affirmed and the petition of intervention herein dismissed.

Dated, March 18, 1903.

SULLIVAN & CROMWELL, *Solicitors.*

91 [Endorsed:] U. S. circuit court of appeals second circuit. The Farmers' Loan & Trust Company, complainant, against Northern Pacific Railroad Company, *et al.*, defendants. In the matter of the intervention of the American Trading Company. Assignment of errors. W. J. W. United States circuit court of appeals, second circuit. Filed Apr. 6, 1903. William Parkin, clerk. Sullivan & Cromwell, solicitors for Northern Pacific Railway Company, 49 Wall street, New York city, N. Y.

92 United States Circuit Court of Appeals, Second Circuit.

THE FARMERS' LOAN AND TRUST COMPANY *against* THE NORTHERN PACIFIC RAILROAD COMPANY *et al.*; Intervention of The American Trading Company. } Supersedeas Bond.

Know all men by these presents, that we, The Northern Pacific Railway Company, a corporation organized under the laws of the State of Wisconsin, as principal, and The United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, having an office in the borough of Manhattan, city and State of New York, as surety, are held and firmly bound unto the American Trading Company, a corporation organized under the laws of the State of Connecticut, in the sum of forty-five thousand dollars ($45,000), to be paid to the said American Trading Company, its successors and assigns, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 2d day of April, 1903.

93 Whereas, the Northern Pacific Railway Company has appealed to the Supreme Court of the United States from a final decree entered in the office of the clerk of the circuit court of appeals of the United States in and for the second circuit on the 26th day of January, 1903, directing the payment to the American Trading Company of twenty-six thousand seven hundred and four dollars and 2/100 with interest from the 4th day of January, 1895, and costs, by the Northern Pacific Railway Company in the suit wherein The Farmers' Loan and Trust Company is complainant and The Northern Pacific Railroad Company and others are defendants.

Now, therefore, the condition of this obligation is such that if the above-named The Northern Pacific Railway Company shall prosecute its said appeal to effect and answer all damages and costs if it

shall fail to make its plea good, then this obligation to be void otherwise to remain in full force and virtue.

[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest: G. TERRY SINCLAIR,
Attorney in Fact.

THE NORTHERN PACIFIC RAILWAY COMPANY,
[SEAL.] By DANIEL S. LAMONT, *Vice President.*

Attest: GEO. H. EARL, *Secretary.*

94 *Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.*

We will bond you.

Contract. Fidelity. Judicial. Burglary.

STATE OF NEW YORK, } *ss:*
County of New York, }

Before me personally came Sylvester J. O'Sullivan, known to me to be the manager, of the United States Fidelity & Guaranty Company, the corporation described in and which executed the annexed bond of the Northern Pacific Railway Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the city of New York, State of New York, and that he is the manager of said The United States Fidelity and Guaranty Company and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of the Northern Pacific Railway Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as manager of said company; and that he is acquainted with G. Terry Sinclair, and knows him to be the attorney in fact of said company; and that the signature of said G. Terry Sinclair, subscribed to said bond is in the genuine handwriting of said G. Terry Sinclair, and was thereto subscribed by order and authority of said board of directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of one million dollars ($1,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 2nd day of April, 1903.

JAMES P. WRIGHT,
Notary Public, New York County.

95 STATE OF NEW YORK, } ss:
County of New York, }

On this 3rd day of April, 1903, before me personally came Daniel S. Lamont, to me known, who being by me duly sworn, did depose and say that he is the vice-president of the Northern Pacific Railway Company, the corporation described in and which executed the foregoing instrument, that he knew the seal of said corporation, that the seal affixed to such instrument was such corporate seal, that it was so affixed by order of the board of directors of said corporation, and he signed his name thereto by like order.

HENRY W. CLARK,
Notary Public, New York County, N. Y.

96 [Endorsed:] United States circuit court of appeals, second circuit. The Farmers' Loan and Trust Company against The Northern Pacific Railroad Company, *et al.* Intervention of the American Trading Company. Supersedeas bond. Approved as to form and also as to sufficiency of sureties with reservation, however, to the appellee of the right at any time to examine the proper officers of the surety company under oath, touching their assets, liabilities and financial condition generally. Wm. J. Wallace, U. S. circuit judge. United States circuit court of appeals, second circuit. Filed Apr. 6, 1903. William Parkin, clerk. Sullivan & Cromwell, solicitors for appellant, 49 Wall street, New York city, N. Y.

97 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 96 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Farmer's Loan & Trust Co. *against* Northern Pacific R. R. Co., American Trading Co. intervenor, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 7th day of April in the year of our Lord one thousand nine hundred and three and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

98 UNITED STATES OF AMERICA, *ss:*

To the American Trading Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the city of Washington, thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of appeals, second circuit, wherein The Northern Pacific Railway Company is appellant, and you are appellee, to show cause, if any there be, why the decree entered in the clerk's office of said circuit court of appeals, second circuit, on the 26th day of January, 1903, in the cause entitled "The Farmers' Loan & Trust Company, complainant, against The Northern Pacific Railroad Company, *et al.*, defendants, intervention of the American Trading Company" should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, on this 6th day of April, in the year of our Lord, one thousand nine hundred and three.

WM. J. WALLACE,
Judge of the Circuit Court of Appeals of the United States for the Second Circuit.

99 (Endorsed:) United States Supreme Court. The Farmers' Loan and Trust Company, *vs.* The Northern Pacific Railroad Company, *et al.* Intervention of the American Trading Company. Citation. Sullivan & Cromwell, solicitors for Northern Pacific R'y Company, 49 Wall street, New York. United States circuit court of appeals, second circuit. Filed Apr. 6, 1903. William Parkin, clerk.

Endorsed on cover: File No. 18,893. U. S. C. C. of appeals, 2nd circuit. Term No. 665. The Northern Pacific Railway Company, appellant, *vs.* The American Trading Company. Filed April 15th, 1903.